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In the Supreme Court of the United States

OCTOBER TERM, 1999

ANTHONY YERKOVICH AND BUFFALO PRODUCTIONS, INC.,
PETITIONERS

V.

MCA, INC. AND UNIVERSAL CITY STUDIOS, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether Petitioners were denied due process by the lower courts' grant of summary judgment based on the lack of certain evidence while simultaneously denying Petitioners' motion to compel that exact evidence.

2. Whether the lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

3. Whether the "adverse inference" rule of evidence applies in summary judgment settings, and whether the Ninth Circuit's failure to apply this rule, contrary to the holdings in the Sixth and Fourth Circuits, was proper.

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PETITION FOR A WRIT OF CERTIORARI

Yanny & Grieco, on behalf of Anthony Yerkovich and Buffalo Productions, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of a panel of the court of appeals (App., *infra*, 1- 4) is unreported. The opinions of the United States District Court for the Central District of California (App., *infra*, 6 - 43) are unreported

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2000. (App., *infra* 1-4) On March 22, 2000, Petitioner filed a petition for rehearing with the court of appeals. On March 31, 2000, the court of appeals denied the petition for rehearing. (App., *infra* 5).The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Rule 56. Summary Judgment

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit factsessential to justify the party's opposition, the court may refuse the

application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

2. Section 636 of Title 28 of the United States Code provides in pertinent part as follows:

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

(5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

STATEMENT

Petitioner Yerkovich was the creator of the television series *Miami Vice*. (App., *infra* 2). Petitioners and Respondents entered into an agreement whereby, among other things, Respondents were to account to Petitioners for certain "net profits" earned from the series. (App., *infra* 13). The definition of "net profits" was contained in an "Exhibit B" to the agreement. (App., *infra* 13).

Under the formula outlined in Exhibit B, Respondents were to account to Petitioners for "gross receipts" and thereafter deduct various expenses to arrive at the "net profits" number. (App., *infra* 56). When a "Producer Company" distributed the series, the gross receipts of the "Producer Company" were to be included as part of Respondents' gross receipts in making the net profits calculation. (App., *infra* 34; 56-66). A "Producer Company" was defined as:

> Producer [Universal] or a company owning or controlling Producer or owned or controlled by Producer or under common ownership or control with Producer. . . .

App., *infra* 34.

Miami Vice was distributed, via cable, by the USA Network which was partially owned or controlled by Respondents. It was therefore Petitioners' contention that Respondents were under a duty to account to Petitioners for the gross receipts of the USA Network in distributing the series as well as Respondents' own gross receipts. It was undisputed that Respondents failed to account to Petitioners for the USA Network's gross receipts, and these gross receipts were the subject of Petitioners' motion to compel and motion for reconsideration of the magistrate's order denying the motion to compel. (App., *infra* 72 - 110).

Petitioners requested that Respondents produce information and documents regarding the USA Network's gross

receipts relating to *Miami Vice*, and when Respondents refused to produce the same, Petitioners made a timely motion to compel. (App., *infra* 6-8; 51-54; 61-67; 74 (no. 15) 78-84; 85-88; 99-110). In opposing the motion, Respondents argued that Petitioners were not entitled to the evidence of the USA Network's gross receipts because Respondents believed Petitioners' interpretation of the net profits definition was incorrect. (App., *infra* 85-88). Therefore, Respondents contended, they did not have to account to Petitioners for the USA Network's gross receipts. (App., *infra* 74 (no. 16); 80-82; 85-88).

The Magistrate who heard Petitioners' motion to compel this evidence realized that if he adopted Petitioners' interpretation of the net profits definition, he would have to order Respondents to produce the evidence of the USA Network's gross receipts to Petitioners. (App., *infra* 109-110). The Magistrate stated that, although the language of the agreement seemed "quite broad", Petitioners' interpretation was "counter-intuitive", and ruled that Respondents did not have to produce the evidence. (App., *infra* 109-110). Petitioners then filed a timely motion under 28 U.S.C. § 636 to have the district court review the Magistrate's decision. (App., *infra* 28-29; 74 (no. 17); 89-98; 102-108).

In opposing the motion under 636, Respondents clearly admitted that the subject of that motion – and the previous motion to compel – was, inter alia, the advertising revenue and other income received by the USA Network. Respondents stated:

> The discovery which is the subject of this motion falls into three general categories: (1) information regarding Universal's overall relationship with USA Network and the advertising revenue received by USA Network in connection with the exhibition of "Miami

Vice"; . . .

(App., *infra* 92). Respondents then argued that Petitioners were not entitled to the information because Petitioners' interpretation of the agreement between the parties was incorrect. (App., *infra* 92-98).

In the meantime, Respondents had filed a Motion for Summary Judgment which was based entirely upon Respondents' contention that its accounting for net profits was correct. Admittedly, Respondents' accounting did not include any of the USA Network's gross receipts. (App., *infra* 9-27; 31-42)

The district court then made two diametrically opposed rulings. On the one hand, she adopted the Magistrate's ruling which was based on Respondents' interpretation of the "net profits" definition (i.e. that the USA Network's gross receipts should not have been included in the net profits definition) and failed to order Respondents to produce the evidence of the USA Network's gross receipts. (App., *infra* 298-29). On the other hand, in ruling of the summary judgment, she adopted Petitioners' interpretation of the net profits definition (i.e. that the USA Network's gross receipts should have been included in Universal's accounting), but then she granted Respondents' Motion for Summary Judgment because Petitioners did not have the evidence of the USA Network's gross receipts - ignoring the fact that Petitioners had made a motion to compel this very evidence and that she denied such motion. (App., *infra* 9-27; 31-43). The District Court admitted that she had adopted Petitioners' interpretation of the Agreement for purposes of the Motion for Summary Judgment (the interpretation which required Respondents to account for the USA Network's gross receipts). (App., *infra* 34-35, fn.1).

Petitioners appealed the grant of the summary judgment to the Ninth Circuit. The Ninth Circuit affirmed the District Court's grant of the summary judgment and denied Yerkovich's

Petition for Rehearing. In its decision, the Ninth Circuit failed to recognize: 1) that Petitioners had made a motion to compel Respondents to produce information regarding the USA Network's gross receipts relating to *Miami Vice;* 2) that the Magistrate denied Petitioners' motion to compel this information; 3) that the district court also denied Petitioners access to this information by denying their motion under 28 U.S.C. § 636; and 4) that the district court nonetheless granted Respondents' motion for summary judgment based upon Petitioners' failure to come forward with the very evidence which Petitioners were seeking in the above mentioned unsuccessful motions.

REASONS FOR GRANTING PETITION

1. The sole issue presented in Respondents' Motion for Summary Judgment was whether Respondents' accounting statement was accurate. However, because the accounting statement did not include an accounting of the USA Network's gross receipts, and because the district court adopted Petitioners' interpretation of the agreement which would have required Respondents to account for the USA Network's gross receipts, the district court's grant of the summary judgment, followed by the Ninth Circuit's affirmance of that decision, deprived Petitioners of due process and a right to a jury trial. Additionally, the lower courts' actions so far depart from the accepted and usual course of judicial proceedings that the same call for an exercise of this Court's supervisory power.

Summary judgment, pursuant to Fed.R.Civ.P. 56, cannot be granted if there exists a "genuine" dispute about a "material fact". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2502, 2510 (1986). In ruling on a Motion for Summary Judgment, a court cannot weigh the credibility of conflicting evidence or testimony, and must draw all reasonable inferences

in favor of the non-moving party. *Id*, 477 U.S. at 255.

Petitioners have not found any cases involving a similar fact pattern to that presented here because the situation presented in this action is so far removed from the usual course of judicial procedure. Namely, the lower court granted summary judgment in favor of Respondents, faulting Petitioners for not having the information necessary to oppose the motion for summary judgment while, in the context of another motion, actively depriving Petitioners of that very evidence by denying Petitioners' motions to compel that information.

Petitioners filed a timely Motion to Compel the information regarding the USA Network's gross receipts. (App., *infra* 85-88; 99-110). This Motion was denied because the Magistrate did not agree with Petitioners' interpretation of the Agreement. In other words, the Magistrate felt that the USA Network's gross receipts did not need to be included within Respondents' accounting statement – the Magistrate stated that if he agreed with Respondents' interpretation, he would not have to order the documents produced. (App., *infra* 109-110). Petitioners then filed a timely motion under 28 U.S.C. § 636 to have the District Court review magistrate's decision. (App., *infra* 89-98; 102-108).

Meanwhile, the District Court granted Respondents' Motion for Summary Judgment. (App., *infra* 9-27). However, the District Court also accepted Petitioners' interpretation of the Agreement that the USA Network's gross receipts must be included in Respondents' accounting statement. (App., *infra* 9-27). Because the actual gross receipts were being withheld from Petitioners, Petitioners provided an expert's report with estimates of the USA Network's gross receipts. The District Court refused to consider Petitioners' estimates, however, because the same were not based on actual numbers. Petitioners explained to the District Court that the actual numbers were in the possession of Respondents and that the Magistrate had

refused to compel Respondents to produce the same. Petitioners also reminded the District Court that they had filed a motion to have the District Court review the Magistrate's decision on the Motion to Compel.

The District Court then made two diametrically opposed holdings. On the one hand, the District Court granted Respondents' Motion for Summary Judgment because Petitioners had not and could not come forward with the evidence of the USA Networks' gross receipts. (App., *infra* 9-27). On the other hand, the District Court denied Petitioners' Motion to Compel this very information from Respondents - the sole parties in possession of such information. (App., *infra* 28-30).

The lower courts also departed from the accepted and usual course of judicial proceedings and deprived Petitioners of their right to a jury trial in that both courts found that summary judgment in favor of Respondents was proper even though it was undisputed that, under Petitioners' interpretation of the Agreement, Respondents' accounting statement was inaccurate. Therefore, a motion for summary judgment which depended solely upon the accuracy of such an accounting statement should not have been granted under any circumstances. In granting the motion, and then affirming the grant of the motion, when there was such a genuine issue of fact remaining - namely what were the gross receipts of the USA Network - the lower courts ignored the usual and accepted course of judicial proceedings by resolving doubts in favor of the moving party and by failing to draw all inferences in favor of the non-moving party. *Anderson*, 477 U.S.242. Thus, Petitioners were deprived of their right to due process and a jury trial on the factual issues. Finally, the Magistrate, in denying Petitioners' Motion to Compel the evidence, exceeded the scope of his jurisdiction in the discovery proceeding by granting a de facto summary judgment in favor of Respondents in violation of 28 U.S.C. § 636(b)(1)(A). By

selecting one of two possible contract interpretations to justify his ruling denying Petitioners access to the information regarding the USA Network's gross receipts, the Magistrate was able to accomplish, in a discovery motion, that which an Article III judge could not do on a summary judgment motion (i.e. adopt one of two possible interpretations of a contract), and thereby deprived Petitioners due process and the right to a trial by jury.

2. In affirming the District Court's decision granting summary judgment, the Ninth Circuit's opinion is in conflict with the opinions of the Sixth and First Circuits regarding the applicability of the adverse inference rule. In *Thomas v. Gusto Records, Inc.*, 939 F.2d 395 (6th Cir. 1991), cert. denied 502 U.S. 984, 112 S.Ct. 591 (1991), the court drew an adverse inference against the defendants based upon the defendants' failure to provide evidence of their profits - even though the defendants asserted a legitimate privilege and their Motion to Quash the subpoena requesting such records was granted. *Id.* at 401-402. The Sixth Circuit found that the district court had properly considered the plaintiff's expert's estimates of the actual profits, finding that the same were proper since the defendants failed to provide actual figures. *Thomas*, 939 F.2d at 400-401. The Sixth Circuit concluded by finding that: "'The party who has caused the loss cannot insist on theoretical perfection.'" *Id.* at 402, quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 928 (2nd Cir. 1977).

The decision of the Ninth Circuit is also contrary to the decision of the First Circuit in a case entitled *Knightsbridge Marketing Services, Inc. v. Promociones Y Proyectos, S.A.*, 728 F.2d 572 (1st Cir. 1984). Therein, the court allowed an expert to estimate the amount of profits lost by plaintiff based comparisons and industry standards rather than on actual amounts because the defendant "refused to furnish the

information that could have eliminated or greatly reduced any speculation." *Id.* at 575. The court applied an adverse inference against the defendant for the defendant's failure to produce the relevant information. *Id.*

A virtually identical situation exists in this action, but here, unlike the Sixth and First Circuits, the Ninth Circuit refused to apply the adverse inference rule and accept Petitioners' expert's estimates, even though it was undisputed that Petitioners' expert was forced to rely upon estimates since the actual figures were being withheld by Respondents.

The lower courts refused to consider the advertising revenues generated by *Murder She Wrote* and faulted Petitioners for not having the advertising revenue figures for *Miami Vice*. (App., *infra* 9-27; 31-42). The lower courts failed to recognize, however, that the *Miami Vice* revenues were being withheld from Petitioners by Respondents, and the district court would not even order Respondents to produce the information.

3. The Ninth Circuit's opinion is also contrary to the opinions of the Fifth, Eleventh, and Second Circuits regarding a non-moving party's right to discovery which is necessary to oppose a motion for summary judgment. In *Wichita Falls Office Associates v. Banc One Corp.*, 978 F.2d 915 (5th Cir. 1992), the non-moving party did not file a motion for continuance of the summary judgment, did not file motion to compel the moving party to produce the evidence necessary to oppose the motion, and did not even propound any discovery requests to the moving party requesting the information even though the motion for summary judgment had been pending for nine months. Still, the Fifth Circuit found that the district court abused its discretion in not granting a continuance of the motion for summary judgment to allow the non-moving party to obtain the necessary information and evidence from the moving party. The Fifth Circuit stated:

It is clear that the non-moving party may not

> rely merely on vague assertions that discovery will produce some unrelated, unspecified facts. [Citation omitted]. However, when a party is seeking discovery that is germane to the pending summary judgment motion it is inequitable to pull out the rug from under them by denying such discovery.

Id. at 920.

In *Snook v. Trust Company of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988), the court found that it was improper for the district court to grant summary judgment while the non-movant had a pending motion to compel on file, even though the non-movant had not made a request for a continuance under FRCP 56(f). The Eleventh Circuit stated:

> [T]he law of this Circuit recognizes that the interests of justice will sometimes require a district court to postpone its ruling on a motion for summary judgment even though the technical requirements of Rule 56(f) havae not been met.

Id. at 871. The court found:

> By failing to rule on the motion to compel, the district court deprived the plaintiffs' of their right to utilize the discovery process to discover facts necessary to justify their opposition to the motion. It is clear that many of the documents requested are relevant to the issues raised by the defendants' motion for summary judgment. It is also clear that many of the requested documents are discoverable. Accordingly, the entry of summary judgment and dismissal of the pendent state law claims was improper and must be reversed.

Id. at 871.

The Second Circuit has also recognized the importance

of deferring a ruling on a summary judgment while discovery is outstanding. In *Meloff v. New York Life Insurance Company*, 51 F.3d 372 (2nd Cir. 1995), the court found:

> The district court quite properly and correctly understood the law pertaining to the grant of summary judgment. However, by faulting plaintiff where she received necessary responses to her interrogatories so close to the date of filing opposition papers on the summary judgment motion that she could hardly have had time to digest either the documentation she was supplied or the answers to interrogatories, much less to take depositions, the district court was over-hasty in granting judgment.

Id. at 375.

The Ninth Circuit's affirmance of the district court's decision to deny a motion to compel and then grant summary judgment based on the lack of the very evidence which was sought by the motion to compel is in direct conflict with the approaches discussed above.

In the present case, not only did Petitioners actively seek the information they needed from Respondents, but Petitioners went to extraordinary lengths to obtain it.

It is beyond dispute that Respondents failed to produce the evidence of the USA Network's advertising revenues. It is also not disputed that Petitioners asked for such evidence, moved to compel the same, and then made a timely motion to the district court for reconsideration of the magistrate's ruling denying the motion to compel. (App., *infra* 85-110).

Further, although it is unclear whether the lower courts relied upon Respondents' contention that they did not have the information sought, Respondents' argument in this regard was frivolous. First, Respondents did not contend that they did not have the evidence until AFTER the deadline for filing Motions

to Compel and seeking discovery through other sources. (App., *infra* 111).

Despite all of Petitioners' Motions which were directed toward obtaining this evidence, Respondents never once argued that they did not have the evidence in any of their papers, nor did Respondents make any objections to the discovery requests on this ground. *George Hantscho Company, Inc. v. Miehle-Gross-Dexter, Inc.*, 33 F.R.D. 332, 334 (S.D.N.Y 1963). Respondents did not provide any sworn statements regarding the relationship between themselves and the USA Network nor do anything else required of them in order for the District Court to have made an appropriate assessment of whether Respondents' claim was truthful. See, e.g. *Uniden America Corporation v. Ericsson, Inc.*, 181 F.R.D. 302 (M.D.N.C. 1998) wherein the court made a detailed review of the facts and relationship between the entities before determining whether the party in suit must produce evidence held by its related entity. Additionally, even AFTER the hearing before the magistrate wherein Respondents' counsel made an offhanded comment that Respondents did not have the evidence, Respondents still failed to raise this argument in opposition to Petitioners' Motion under 28 U.S.C. § 636. (App., *infra* 89-98). The first time Respondents made this argument in writing was in their Appeal Brief to the Ninth Circuit.

That Respondents had this information, however, is obvious, for it is undisputed that it was own counsel who prepared the objections to the subpoena which Petitioners had served upon the USA Network, thereby depriving Petitioners from obtaining this information directly from the USA Network. *M.L.C., Inc. v. North American Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986); (App., *infra* 82).

CONCLUSION

Petitioners respectfully request this Court to accept certiorari to determine the questions presented herein.

Respectfully submitted,

Joseph A. Yanny, Esq.
Attorney of Record
Mary L. Grieco
YANNY & GRIECO

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1983

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Petitioner,

v.

MCA, INC. AND UNIVERSAL CITY STUDIOS, INC.,
Respondents.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
March 1, 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ANTHONY YERKOVICH, an individual; BUFFALO PRODUCTIONS, INC, a California corporation,

Plaintiffs-Appellants,

v.

MCA, INC. a corporation; UNIVERSAL CITY STUDIOS, INC, a Delaware corporation, UNIVERSAL TELEVISION, a corporation,

Defendants-Appellees.

No. 98-55660

D.C. No. CV-94-03927 ABC

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted February 9, 2000
Pasadena, California

BEFORE: WIGGINS, RYMER, and FISHER, Circuit Judges.

Anthony Yerkovich appeals the district court's grant of summary judgment in favor of MCA, Inc. and Universal City Studios, Inc. (hereinafter collectively "Universal"). This suit stems from an individual services contract between Yerkovich and Universal ("the Agreement") pursuant to which Yerkovich wrote a pilot teleplay that Universal subsequently produced as the television show *Miami Vice*. Yerkovich granted Universal rights to *Miami Vice* in return for up-front compensation and a percentage of the net profits that Universal received from exploiting the show. Yerkovich alleged that Universal breached the Agreement by failing to properly account for net profits. Yerkovich also alleged various state and federal claims.

The district court granted summary judgment on Yerkovich's Third claim for breach of contract. It found that even accepting Yerkovich's interpretation of the Agreement, there was insufficient admissible evidence showing that Yerkovich was entitled to additional money under the Agreement. After conducting an extensive review of the record, we agree with the district court's conclusion.

On appeal, Yerkovich argues he was unable to present sufficient evidence to defeat summary judgment because he was improperly denied relevant discovery. After a careful review of the record, including the magistrate judge's discovery rulings and the hearings before the district court regarding reconsideration of those rulings, we find that Yerkovich's failure to obtain the evidence he sought was attributable in large part of his own delay and litigation strategies, and in any event the district court did not abuse its discretion.

We conclude that Yerkovich has waived the issue of whether the district court erred in denying his motion for reconsideration of the summary judgment order. Yerkovich raised this issue in his "Statement of the Issues," but he did not

address it further in his brief. See McLain v. Calderon, 134 F.3d 1383, 1384 n. 2 (9th Cir. 1998), cert. denied 119 S.Ct. 364 (1998).

With respect to Yerkovich's claims for breach of contract, copyright infringement, and declaratory relief, the district court properly found that the Agreement assigned all of Yerkovich's rights to Universal. The district court also properly held that Yerkovich's claim that the assignment of rights provision was unconscionable was barred by the statute of limitations.

As for Yerkovich's breach of fiduciary duty claim, the district court correctly concluded that fiduciary relationships do not normally arise from arms-length business transactions. See Order of Nov. 28, 1996, at 18 (citing Henry v. Associated Indemnity Corp., 217 Cal.App.3d 1405, 1419 (1990)). In addition, the Agreement expressly disclaims the creation of a fiduciary relationship.

Regarding Yerkovich's breach of implied covenant of good faith and fair dealing claim, the district court correctly found that California law clearly precludes tort recovery for noninsurance contract breach of the implied covenant of good faith and fair dealing. See, e.g., Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 679-80 (Cal. 1995). In addition, Yerkovich's claim cannot survive as a contract claim. Under California law, such an implied covenant cannot be read into a contract if it directly conflicts with the express language of the contract, unless such a convent is necessary to keep the contract from becoming an illusory agreement. See Third Story Music, Inc. v. Waits, 48 Cal.Rptr.2d 747, 753 (Cal. Ct. App. 1995). The Agreement included guaranteed compensation to Yerkovich, so it is not illusory.

With respect to Yerkovich's fraud claim, the district court correctly held that the parol evidence rule bars evidence of an alleged fraudulent promise which directly contradicts the

Agreement.

As for Yerkovich's antitrust claim, the district court correctly found that Yerkovich failed to assert any facts showing an antitrust injury.

Finally, Yerkovich seeks review of the district court's 12(b)(6) dismissal of his claim seeking a declaratory judgment that the "arbitrability arbitration" has no bearing on this case. Because all of Yerkovich's substantive claims were properly dismissed, this claim is moot.

The panel appreciates the district court's clear articulation of the bases for its rulings on its various orders.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
March 31, 2000
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ANTHONY YERKOVICH, an individual; BUFFALO PRODUCTIONS, INC, a California corporation,

Plaintiffs-Appellants,

v.

MCA, INC. a corporation; UNIVERSAL CITY STUDIOS, INC, a Delaware corporation, UNIVERSAL TELEVISION, a corporation,

Defendants-Appellees.

No. 98-55660

D.C. No. CV-94-03927 ABC

ORDER

BEFORE: RYMER and FISHER, Circuit Judges*[1]

Judge Rymer and Judge Fisher have voted to DENY the Petition for Rehearing, filed March 22, 2000.

[1]*Judge Wiggins participated in the decision of this case but died prior to the filing of the petition for rehearing.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

Case No. CV94-3927-ABC (AJWx)
Date: September 30, 1997

Title: ANTHONY YERKOVICH, et al. v. MCA, INC., et al.

PRESENT:

HON. ANDREW J. WISTRICH, U.S. MAGISTRATE JUDGE

Y. Benavides
Deputy Clerk

_____
Tape No.

ATTORNEY(S) FOR PLAINTIFF(S):
ATTORNEY(S) FOR DEFENDANT(S):

PROCEEDINGS: ORDER REGARDING UNIVERSAL'S MOTION FOR PROTECTIVE ORDER RE YERKOVICH'S SECOND AND THIRD DOCUMENT REQUEST, ETC.: UNIVERSAL'S MOTION FOR PROTECTIVE ORDER RE 30 (b) (6) DEPOSITION NOTICES; PLAINTIFFS' MOTION TO COMPEL

Before the Court are four discovery motions. They concern plaintiffs' Rule 30(b) (6) deposition notice, plaintiffs' second and third requests for production of documents and plaintiffs' first set of interrogatories, all directed to defendant Universal Studios, Inc. As to each of the discovery requests at issue, plaintiffs have moved to compel discovery and defendant has moved for a protective order. The Court has considered the papers filed by the parties and the arguments made by counsel

during the hearing on the motion.

Document Requests

As to Document Requests nos. 34 and 35, plaintiffs's motion is granted in part and denied in part. Universal is directed to do what it previously has agreed to do, namely, to produce a sampling of production cost reports for one hour television dramas with respect to which profit participation agreements were entered into between Universal and another person or entity during the period 1980 through 1990. [See Joint Stipulation at 10-11]. The parties are directed to confer and agree upon an appropriate method of sampling.

As to Document Request nos. 40 and 53, plaintiff's motion is granted in part and denied in part. Only agreements between Universal and USA Network relating to "Miami Vice' need be produced.

As to Document Request nos. 54-56, plaintiff's motion is granted in part and denied in part. Universal is directed to produce all documents regarding the gross receipts received by Universal from USA Network or other sources from the exhibition or other use of "Miami Vice."

As to Document Request nos. 57 and 58, plaintiffs' motion is denied.

As to Document Request nos. 44 and 45, plaintiff's motion is denied.

As to Document Request no. 61, the motion is denied.

Interrogatories

As to Interrogatories nos. 1 and 2, plaintiffs's motion is denied.

Deposition Notice

As to category nos. 7-8, plaintiff's motion is denied.

As to category nos. 10-14, plaintiff's motion is denied.

As to category no. 15, plaintiff's motion is denied as moot in light of Universal's agreement to produce a witness to testify as to this category with respect to "Miami Vice". [Joint Stipulation at 17-18].

As to category nos. 16, plaintiffs' motion is denied in light of Universal's agreement to produce a witness to testify regarding gross receipts received from Universal, Inc., USA Network in respect to "Miami Vice." [See Joint Stipulation at 20].

As to category no 17, plaintiffs' motion is denied.

As to category nos. 18-19, plaintiff's motion is granted.

To the extent that plaintiff's motion to compel discovery is granted, defendant's motion for a protective order is denied. To the extent that plaintiff's motion to compel discovery is denied, defendant's motion for a protective order is denied as moot.

To the extent that Universal is required to produce documents or witnesses pursuant to this Order, Universal shall produce them no later than October 13, 1997.

IT IS SO ORDERED.

cc: Parties

/s/
Initial of Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Anthony Yerkovich, et al.,	CASE NO.: CV 94-3927 ABC (AJWx)
Plaintiffs,	ORDER RE: Defendants' Motion for Summary Judgment
vs.	
MCA, Inc., et al.,	
Defendants	

Defendants' Motion for Summary Judgment or Partial Summary Judgment came on regularly for hearing before this Court on October 6, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendants' Motion is GRANTED.

I. Procedural Background

On June 10, 1994, Plaintiffs ANTHONY YERKOVICH and BUFFALO PRODUCTIONS, INC. ("Plaintiffs") filed a Complaint against Defendants MCA, INC and UNIVERSAL CITY STUDIOS, INC. ("Universal" or "Defendants"). Plaintiffs filed a First Amended Complaint ("FAC") on October 3, 1994. In the FAC, Plaintiffs brought the following causes of action against Defendants: (1) copyright infringement; (2) declaratory relief; (3) breach of contract (federal); (4) breach of contract (state); (5) breach of fiduciary duty; (6) breach of the implied covenant of good faith and fair dealing; (7) antitrust violations; (8) imposition of a constructive trust; and (9) an accounting. On April 19, 1995, the court dismissed the FAC's

seventh claim for relief (antitrust violations) and stayed the action pending an arbitration to determine which claims in the FAC were subject to arbitrability.[2]

On November 3, 1995, Arbitrator Edgar A. Jones, Jr. rendered his decision concerning the arbitrability of the FAC's claims. See Arbitration Opinion and Award, WGA Case No. 94-SR-10 (Exhibit B in Support of Defendants' Motion).[3] Essentially, Arbitrator Jones found that to the extent that Plaintiffs' claims are based on an alleged breach of the Writers Guild of America/Universal Collective Bargaining Agreement ("CBA"), the claims are arbitrable. Further, Arbitrator Jones found that to the extent that Plaintiffs' claims are not based on rights derived from the CBA, the claims are not arbitrable. Pursuant to the CBA, the parties to this arbitration were Defendant Universal Studios and the WRITERS GUILD OF AMERICA ("WGA"). Plaintiffs were not a party to the arbitration. Regardless, the arbitrator (and the parties) allowed Plaintiffs to submit briefs to the arbitrator.

On March 4, 1996, Plaintiffs filed a Second Amended Complaint ("SAC"). In the SAC, Plaintiffs brought claims for: (1) a declaration that the "arbitrability arbitration" is not binding on this Court; (2) breach of Plaintiffs' agreement with Defendants and the CBA; (3) breach of fiduciary duty; (4) breach of the implied covenant of good faith and fair dealing; (5) fraud; (6) copyright infringement; (7) a declaration of copyright ownership and rights; (8) imposition of a constructive trust; and

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[2]In additon, the Court denied without prejudice a Motion by the Writers Guild of America for leave to file a Complaint in Intervention.

[3]In its June 24, 1996 Order, the Court took judicial notice of the Arbitration Opinion and Award pursuant to Federal Rule of Evidence 201.

(9) an accounting. On April 8, 1996, the Court lifted the stay of the action.

Meanwhile, on March 26, 1996, Universal Studios filed a Petition to Confirm Arbitration Award. See Universal City Studios, Inc. v. Writers Guild of America, West, Inc., Case No. CV 96-2135 ABC (Ex). The WGA did not oppose this Petition. On May 14, 1996, the parties to the arbitration filed a Stipulation for Entry of Final Judgment Confirming the Arbitration Award. This stipulation was served on the Plaintiffs in the instant case. On May 15, 1996, the Court signed the judgment confirming the November 3, 1995 arbitration award.

On May 14, 1996, Defendants filed a motion to dismiss the first and second claims in Plaintiffs' SAC, essentially asserting that these claims were precluded either by the Court's prior Order or by the November 3, 1995 arbitration award. On June 24, 1996, the court dismissed Plaintiffs' first and second claims without prejudice.

On July 24, 1996, Plaintiffs filed a Third Amended Complaint ("TAC"), which joined the WGA as an additional Defendant. In the TAC, Plaintiffs bring claims for: (1) breach of the duty of fair representation (against WGA); (2) declaratory relief (against all Defendants); (3) breach of contract (against Universal); (4) breach of contract (against Universal); (5) breach of fiduciary duties (against Universal); (6) breach of the implied covenant of good faith and fair dealing (against Universal); (7) fraud (against Universal); (8) copyright infringement (against Universal); (9) copyright infringement (against Universal); (10) declaratory relief (against all Defendants); (11) a constructive trust (against Universal); and (12) an accounting (against Universal).

On September 12, 1996, Universal filed a motion to dismiss the entire TAC. On November 28, 1996, the Court granted Defendants' motion in part and dismissed Plaintiffs' second, fifth, sixth, and seventh claims with prejudice. The

Court denied Defendants' motion as to Plaintiffs' third, fourth, eight, ninth, tenth, eleventh, and twelfth claims ("remaining claims").[4]

On January 7, 1997, Defendants filed an Amended Motion for Judgment on the Pleadings, along with an Alternative Motion for Summary Judgment, directed towards Plaintiffs' unconscionability claims as well as the other remaining claims. On February 24, 1997, the Court granted Defendants' Motions in part and denied them in part. Specifically, the Court granted Defendants' Amended Motion for Judgment on the Pleadings with regard to Plaintiffs' unconscionability claims, as well as their Fourth, Eighth, Ninth, and Tenth Claims.

However, the Court denied Defendants' Amended Motion for Judgment on the pleadings and Alternative Motion for Summary Judgment with respect to Plaintiffs' Third Claim. Finally, the Court reserved judgment on Defendants' Amended Motion for Judgment on the pleadings with respect to the Eleventh and Twelfth Claims.[5]

On June 6, 1997, Defendants filed a Motion for Judgment on the Pleadings, which the court subsequently construed as a motion for reconsideration based on the recently issued Ninth Circuit opinion in Beals v. Kiewit Pacific Co., 114 F.3d 892 (9th Cir. 1997). By Minute Order dated July 29, 1997, the Court summarily denied the motion on the ground that Beals did not change the law interpreting preemption under the Labor Management Relations Act.

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[4] The First Claim against Defendant WGA was dismissed by stipulation.

[5] Plaintiffs' Eleventh and Twelfth Claims for constructive trust and an accounting seek remedies which will be available only if Plaintiffs prevail on a substantive claim.

After the Court's February 24, 1997 Order, the only substantive claim remaining was Plaintiffs's Third Claim for breach of contract. On September 15, 1997, Defendants filed a Motion for Summary Judgment or Partial summary Judgment regarding Plaintiff's Third Claim. On September 22, 1997, Plaintiffs filed an Opposition to the Motion, and Defendants filed their Reply on September 29, 1997.

II. Factual Background

The facts underlying this case were set out more fully in the Court's April 19, 1995 and June 26, 1996 Orders. The factual background is well-known to the parties and need not be repeated here. However, the Court will the facts that the court finds to be uncontroverted by competent evidence for purposes of Defendants' Motion for Summary Judgment or Partial Summary Judgment:

Universal Television, the division of Universal City Studios, Inc. primarily responsible for producing its televison product, and Chrome-Dakota Productions ("Chrome-Dakota"), plaintiff Anthony Yerkovich's loan out corporation, entered into an agreement dated June 7, 1983 (the "1983 Agreement" or "Agreement") pursuant to which Universal was entitled to Yerkovich's writing, directing, and producing services on an exclusive basis for a two year term, with two one-year options for such services thereafter.

Pursuant to the terms of the 1983 Agreement, Yerkovich received substantial guaranteed and episodic compensation and the right to a percentage of "net profits," which "net profits" were to be computed and paid in accordance with EXHIBIT B attached."

The 1983 Agreement was amended by memorandum agreements dated June 11, 1985 and January 27, 1986.

Yerkovich wrote the pilot for the television series "Miami Vice" during the term of the agreement.

Pursuant to the Agreement, Yerkovich became entitled

to approximately 15.351% of the "net profits" generated by the "Miami Vice" televison series.

Pursuant to the Agreement, Yerkovich has been paid almost $1,700,000 in advances against his "net profit" participation interest.

As a result of the advances paid to Yerkovich, "Miami Vice" will need to generate "net profits" of over $11,000,000 in order for Yerkovich to recover any additional monies.

Universal has submitted to Plaintiffs a profit participation statement indicating that there are no "net profits" for Miami Vice; rather there is a cumulative net loss of $192,018,622, and no amount is due to Plaintiffs.

III. Discussion

A. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is " no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Calderone v. Untied States, 799 F. 2d 254, (6th Cir. 1986) (quoting W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact., 99 F.R.D. 465, 487-88 (1984). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in that party's favor. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). Furthermore, the court must view the evidence presented to establish these laments "through

the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponents's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In other words, the moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence and support the nonmoving party's case. "Id.

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." Anderson, 477 U.S. at 252. The evidence of the nonmoving is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 248; Griffith v. Utah Power & Light Co., 226 F.2d 661, 669 (9th Cir. 1955).

B. Analysis

In supporting of their Motion for Summary Judgment, Defendants advance the following arguments:

(1) Exhibit B to 1983 Agreement determines how "net profits" are defined and calculated for purposes of the Agreement;

(2) Under the definition of "net profits" in Exhibit B,

Universal has no "net profits" for the Miami Vice televison series through December 31, 1997; instead there is a cumulative "net loss" of $192,018,622;

(3) Because Yerkovich has been advanced $1,700,000 against any net profits due to him, Universal would have to generate over $11,000,000 in "net profits" on Miami Vice before any additional monies would be due to Yerkovich under the 1983 Agreement;

(4) Accordingly, Yerkovich would have to prove that Universal's accounting was in error by more than $200,000,000 in order to prove that Universal breached the 1983 Agreement; and

(5) Plaintiffs have the burden of proof on the remaining Third Claim for breach of contract, and have not shown any competent evidence that they are entitled to additional monies under the Agreement.

In their Opposition to the Motion for Summary Judgment, Plaintiffs make the following arguments:

(1) Exhibit B was not part of Yerkovich's 1983 Agreement with Universal and, therefore, the terms included therein do not govern the definition of "net profits" or Yerkovich's entitlement thereto;

(2) Even if Exhibit B were regarded as being part of the 1983 Agreement, genuine issues of material fact exist as to the meaning of the terms of Exhibit B;

(3) Exhibit B should be construed so as to include the gross advertising revenue of USA Network within Universals's gross receipts for Miami Vice, and Universal should be entitled to deduct, at most, a 20% distribution fee from the USA Network advertising revenue; and

(4) Because Universal has refused to produce certain documents supporting its calculation of "net profits," it should be precluded from claiming that Plaintiffs cannot show that Universal's figures are incorrect.

The Court will address Plaintiffs' arguments in turn.

1. Exhibit B to the 1983 Agreement

Plaintiffs argue that Exhibit B to the 1983 Agreement was not part of the contract entered into between Plaintiffs and Universal. Specifically, Plaintiffs contend that: (1) Exhibit B was not physically attached to Agreement when Plaintiff Yerkovich signed it; (2) the definition of "net profits" in Exhibit B does not confirm to the representations made by Universal's representative at the time of contracting; and (3) Exhibit B should not be construed as part of the 1983 Agreement. The Court disagrees.

The Court is disturbed by the fact that Plaintiffs' disavowal of Exhibit B comes for the first time on the eve of trial – over three years after the filing of a Complaint that was significantly amended on three occasions. This recent disavowal is based primarily on information that was known to Plaintiff Yerkovich at the outset of litigation, yet was never raised in any of the numerous pleadings and briefs that have been before the Court over the last three years.[6]

More importantly, however, Plaintiffs' disavowal of Exhibit B directly contradicts certain admissions and statements made by Plaintiffs in prior pleadings, declarations, and briefs. For example, in Plaintiffs' Third Amended Complaint, they allege that "the Yerkovich/Universal Agreement is nothing but the standard form contract with standard riders attached which contract and readers were drafted by Universal and presented to Plaintiffs as a 'take it or leave it' deal." [TAC par. 6 (emphasis

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[6] In certain of its numerous Orders int his action, the Court has expressly ruled based on the terms of Exhibit B without objection from Plaintiffs. See November 28, 1996 Order, p.21, fn. 13 ("This court has previously considered the contents of the contract without any objection form Plaintiffs as to the parties' agreement on the written terms.").

added)]. Further, Plaintiffs allege that "[p]ursuant to the terms of the Yerkovich/Universal Agreement, Universal was obligated to account to Plaintiffs for profits generated form the Miami Vice televison series." [TAC § 47]. An examination of the signed contract and the attached form exhibits shows that the only contractual provisions which provide for such a duty are set forth within Paragraph B of Exhibit B. Further, Yerkovich's business manager, Michael Mesnick, has testified that his demand for an account on behalf of Yerkovich in 1994, as alleged in Paragraph 48 of the TAC, was based upon provisions within Exhibit B. [See Mesnick Depo. 26:9-17, 36:8-11]. Therefore, Yerkovich has alleged in his TAC that he has a contractual right to an accounting pursuant to Exhibit B.

Consistent with these allegations, Plaintiffs have expressly relied upon Exhibit B in their Opposition to Defendants' Alternative Motion for Summary Judgment[7] and have tacitly admitted in their Statement of Genuine Issues in connection therewith that excerpts from Exhibit B were undisputed and "merely quotations[s] from a contract which speaks for itself."[8] Further, in his January 1997 declaration, Plaintiff Yerkovich stated that "the agreement itself appears to

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[7] For example, Plaintiffs quoted extensively from Paragraph B of Exhibit B and stated that '[t]he existence of these contractual provisions cannot be disputed and their application defeats Universal's present motion." [Opp. to Def.'s Alt. Mot. for Summ. Judg. at p. 8:20-21].

[8] Pltf.'s Statement of Gen. Issues in Opp. to Def.'s Mot. for Summ. Judg. at p. 2:5-8]. Under Local Rule 7.14.3, the Court will assume any uncontested facts to be admitted. Moreover, "the failure to contest a party's statement of uncontested facts is treated as a binding admission." Tobey v. Extel/JWP, Inc., 985 F.2d 330, 333 (7th Cir. 1993). Moreover, "an admission trumps evidence, rather than vice versa." Id.

be a standard form contract with Universal's pre-form exhibits that Universal refused to modify through negotiation." [Yerkovich Decl., Par 4].

"[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). Moreover, "factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." Id. at p. 227. The Court regard Plaintiffs' allegations in the TAC and their statements in opposition to Defendants' prior motion as binding judicial admissions, which may not be contradicted or repudiated on the eve of trial in an effort to avoid summary judgment. See Curb v. MCA Records, Inc., 898 F. Supp. 586, 590 (M.D. Tenn. 1995) ("Admissions or statements a party makes in the course of litigation bind that party upon a motion for summary judgment [and] . . . eliminate the need for evidence on the subject matter of the admission, as admitted facts are no longer at issue.") see also Soo Line Railroad Co. v. St. Louis Southwestern Railway Co., __ F.3d __, 1997 WL 557887, at *2 (7th Cir. 1997) ("judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court . . .").

Even if Plaintiffs' statements were not regarded as judicial admission, Exhibit B would still be construed as part of the 1983 Agreement as a matter of law. Plaintiffs are bound by the terms of Exhibit B because it was specifically incorporated by reference into the 1983 Agreement. Under California law, contracting parties "may validly incorporate by reference into their contract the terms of another document" that is not attached thereto. Slaught v. Bencomo Roofing Co., 25 Cal. App. 4th 744, 748 (1994). "The reference to the incorporated document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the

contracting parties." Id.

In the instant case, the incorporation of Exhibit B by reference is clear and unequivocal. Paragraph 5(D)(1) of the Agreement expressly states; "Net profits shall be computed and paid in accordance with EXHIBIT B attached." Further, Exhibit B was easily available to Plaintiffs as indicated by Yerkovich's testimony that he was told that Exhibit B was available in Universal's legal department. [See Yerkovich Depo. at p. 130:17-20]. Under such circumstances, Plaintiffs are bound by the terms of Exhibit B a matter of law. See Trottier v. M.H. Golden Const. Co. 105 Cal. App. 2d 511, 515-16 (1951) (where document incorporated by reference into contract was available at defendant's offices, "plaintiffs were bound to investigate its terms and conditions.").

For reasons explained above, the Court finds that, by both judicial admission and as a matter of law, Exhibit B is part of the 1983 Agreement.

2. Ambiguity of Contract Terms

Plaintiffs make several arguments regarding the alleged ambiguity of contract terms contained within Exhibit B. Under California law, the determination of whether a written contract is ambiguous is a question of law. See Brobeck, Phleger &U Harrison v. Telex Corp., 602 F. 2d 866, 871 (9th Cir.), cert. denied, 444 U.S. 981 (1979). In this case, however, the Court need not determine the meaning of the allegedly ambiguous terms because, as discussed below, Plaintiffs have failed to show by competent evidence that the resolution of these alleged ambiguities in their favor would result in their entitlement to additional monies under the 1983 Agreement.

3. Gross Advertising Revenue and Distribution Fees from USA Network

Based on claimed ambiguities in Exhibit B, Plaintiffs contend that: (1) the gross advertising revenue USA Network derived from Miami Vice should be included in the

calculation of Universal's gross receipts for Miami Vice;[9] and (2) that Universal is entitled to, at most, a 20% distribution fee on revenues from USA Network.[10] However, Plaintiffs have now shown by competent evidence how resolute of these claimed ambiguities may result in additional monies being owed to them.

Universal has presented admissible evidence demonstrating that it accounted to Plaintiffs for "net profits" pursuant to Exhibit B of the 1983 Agreement. [See Bradley Decl. and Ex. A thereto]. Plaintiffs have failed to present any admissible evidence to rebut the propriety of Universal's accounting. The only effort to address the accounting issue in any respect is the Declaration of William Adelmann. However, Adelmann testified in this deposition that he has no opinion at all as to the accuracy of Universals'accounting to Plaintiffs under Exhibit B. [See Adelmann Depo. at p. 13:9-14:1].

Rather, Adelmann's declaration sets forth one calculation under Exhibit B that is based on assumptions which

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[9] This argument is based on: (1) the presumption that USA Network, was a "distributor" of Miami Vice under the terms of the contract, and that USA Network was jointly owned by Universal and Paramount (Viacom) at the time of distribution; (2) a provision in Exhibit B, par A(b) (4), which reads: "If the Photoplays are distributed by a Producer Company, gross receipts of that Producer Company shall be deemed gross receipts of Producer, except as otherwise herein provided."; and (3) the terms of Exhibit B ? A (g), which reads: "'Producer Company' is Producer or a company owning or controlling Producer, or owned or controlled by Producer or under common ownership or control with Producer or any Producer Company.

[10] This argument is based on the assumption that USA Network (a cable channel) qualifies as a "United States National Network" under the terms of Exhibit B, par A(c) (2).

have no relationship to the evidence in this case.[11] Based on this calculation, Mr. Adelmann concludes that Miami Vice made a total "net profit" under Exhibit B of $33,796,000, and Plaintiffs are due $4,534,000. Specifically, Adelmann calculates that the gross receipts of Miami Vice were $120 million more than reported based on inclusion of the gross advertising revenue USA Network ($160 million)[12] derived from Miami Vice within Universal's gross receipts, rather than the basic cable licensing fee USA Network paid to Universal (over $40 million) for the right to exhibit Miami Vice. Adelmann does not, however, adjust his estimated Miami Vice gross revenue from USA Network ($160 million) to reflect the fact that Universal was only entitled to half that sum ($80 million) because it shares ownership of USA Network equally with Paramount. This $80 million adjustment alone is sufficient to show that there would be no "net profits" under Exhibit B, even if Plaintiffs' other

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[11] The Court does not consider Adelmann's second and third calculations. These calculations are not based upon Exhibit B, which the Court has found to be part of the 1983 Agreement.

[12] Adelmann bases his conclusion that USA Network's advertising revenues were approximately $160 million on Joseph Abruscato's opinion that "[o]n the average, the expected advertising revenues [from a first cycle syndication of a TB show to broadcast stations] would be 3.5 times the license fee paid." [Abruscato Decl. par; Abruscato Depo. at p. 127:3-20] (In this case, a $400,000 per episode license fee was paid. Thus, the estimated advertising revenue under Abruscato's assumptions would be $1.4 million per episode. Multiplied by 114 episodes, this estimated revenue would total nearly $160 million). However, Abruscato testified that he had absolutely no information regarding the ratio of advertising revenue to license fees for basic cable channels such as USA Network. [Abruscato Decl. at p. 128:11-13]. Accordingly, Abruscato's unsupported conclusion regarding advertising revenue cannot support the assumptions underlying Adelmann's calculations.

arguments (including deduction of only a 20% distribution fee from USA Network) had merit.

Additionally, Adelmann fails to account for any estimated costs incurred by the USA Network due to the exhibition of Miami Vice. Under Exhibit B, Universal would be entitled to deduct its share of these costs as distribution expenses. Finally, Adelmann's calculation of actual production costs is based solely upon hearsay statements and irrelevant information regarding the per episode production costs of Miami Vice and another television show.[13]

Adelmann's unsupported calculation does not raise a genuine issue of fact as to whether Universal properly accounted to Plaintiffs or whether any additional monies are due Plaintiffs. Adelmann has acknowledged that he has no opinion as to the accuracy of Universal's accounting to Plaintiffs, and that his calculation was based solely on assumptions made pursuant to instructions from Plaintiff's counsel. [Adelmann Depo. pp. 13:9-14:1; 59:14-19]. This calculation does not constitute an admissible expert opinion because, as noted above, it is based on unfounded assumptions.

"[A] party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific

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[13] Plaintiff Yerkovich stated in his declaration that he had been told by line producers for Miami Vice that the "pattern budgets" for Miami Vice were $1.1 million per episode and that the actual costs rarely exceeded the pattern budgets. [Yerkovich Decl., Par 15. This statement is hearsay. In addition, Mr. Phillip DeGuere provided information that production costs for an entirely different television show--Simon & Simon--averaged $1.16 million per episode. [DeGuere Decl. Par. 4]. This statement is irrelevant to the production costs of Miami Vice. As noted above with regard to Plaintiffs' arguments regarding advertising revenues from USA Network, the exclusion of Plaintiffs' unsupported arguments regarding production costs further negates any possibility of "net profits" under Exhibit B.

facts from the record to support its conclusory allegations." Evers v. General Motors Corp., 770 F. 2d 984, 986 (11th Cir. 1985). "[I]n the context of a motion for summary judgment, an expert must back up his opinion with specific fact." United States v. Various Slot Machines on Guam, 658 F. 2d 697, 700 (9th Cir. 1981). An expert's opinion based on unsupported assumptions and with no basis in the evidentiary record is defective. See Id. Moreover, an expert's declaration is inadequate when it is "nothing more than bare conclusions derived from erroneous data." Slaughter v. Southern Talc. Co., 919 F.2d 304, 307 (5th Cir. 1990). In this case, Adelmann's calculation within his declaration does not constitute admissible opinion and, accordingly, does not raise an issue of fact sufficient to preclude summary judgment.

4. Request for Further Discovery

Plaintiffs claims that "Universal has engaged in egregious discovery abuses" and that the instant motion should be ended pursuant to Fed. R. Civ. P. 56(f). [Opp. at p. 26]. In essence, Plaintiffs claim that the only reason that they have been unable to present evidence establishing that Universal's accounting is over $200 million in error is Universal's refusal to provide them with necessary discovery. The court has reviewed the various declaration discussing discovery-related issues and finds that both Plaintiffs' and Defendants must share the blame for discovery delay. However, Plaintiff's eleventh-hour claim of prejudice is not sufficient to avoid summary judgment.

Federal Rule of Civil Procedure 56(f) provides that if a party opposing summary judgment demonstrates inability "for reasons stated [to] present by affidavit facts essential to justify the party's opposition," the Court may deny the motion for summary judgment or continue the sharing to allow additional discovery, or "make such other order as is just." Fed. R. Civ. P. 56(f); Bainco v. H.F. Ahmanson & Co., 897 F. Supp. 433, 438 (C.D. Cal. 1995). The party seeking the continuance bears the

burden to show what specific facts it hopes to discover that will raise an issue of material fact. Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1395 (9th Cir. 1987); Bianco, 897 F. Supp at 438.

In this case, however, Plaintiff has made no formal Rule 56(f) motion. "References in memoranda . . . to a need for discovery do not qualify as motions under Rule 56(f)." Brae Transp. Inc. v. Coopers & Lybrand, 790 F. 2d 1439, 1443 (9th Cir. 1986). Therefore, no motion for continuance pursuant to Rule 56 (f) is before the Court. See Bianco,, 897 F. Supp. at 438.

Finally, Plaintiffs cannot complain because they waited until the eve of trial to diligently pursue discovery and file motions to compel. See Brae Transp. Inc., 790 F.2d at 1443; see also oualls v. Blue Cross of California, Inc., 22 F. 3d 839, 844 (9th Cir. 1994) (not an abuse of discretion to refuse to permit further discovery before ruling on summary judgment motion when party failed to diligently pursue its previous discovery opportunities). In this case, Plaintiffs filed their initial Complaint on June 10, 1994, over three years ago. The essence of plaintiff's only remaining claim for breach of contract was alleged in that initial Complaint.[14]

Additionally, as of this Court's February 24, 1997 Order, Plaintiffs were informed that the accounting issues of their breach of contract claim (Third Claim of the TAC) were the only remaining substantive issues in this case. Accordingly, Plaintiffs had over three years to conduct general discovery, and over seven months to conduct very focused discovery on the sole remaining issues of proper accounting under the 1983

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[14] See Comp., Par 37 ("Plaintiffs are further informed and believe and based thereon allege that Defendants have breached their agreement with Plaintiffs by failing to account to Plaintiffs and pay Plaintiffs all sums due to Plaintiffs under the terms of the agreement.")

Agreement. Plaintiffs decided to wait until the eve of the discovery cutoff to complete discovery and file motions to compel. They could have done so much earlier, or they could have requested an extension of the discovery cut-off and pre-trial and trial dates, which they have not done.[15] Consequently, the Court will not grant Plaintiffs' eleventh-hour request for a continuance.

Because Plaintiffs have not presented any competent evidence to show that Universal has failed to properly account to them, or that any additional monies are due to them under the 1983 Agreement, Defendants' Motion for Summary Judgment is GRANTED to all remaining claims in this action.[16]

IV. Conclusion

For the reasons discussed above, the Court hereby ORDERS that Defendant's Motion for Summary Judgment is

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[15] In fact, on August 25, 1997, the parties filed a stipulation to continue the discovery cut-off and motion cut-off dates to October 3, 1997 and October 6, 1997, respectively. The Court notes that the stipulation stated that Defendants intended to file the instant motion for summary judgment and Plaintiffs intended to file the motion for reconsideration, ruled upon today in a separate Order. In the same stipulation, the parties emphasized that the stipulation did not affect pre-trial and trial dates, and that neither side would seek a continuance. The Plaintiffs have not sought any extension of these dates from the Court. See Abrams Decl. II, Ex. H.

[16] The Court finds that Plaintiffs' Eleventh and Twelfth Claims for imposition for a constructive trust and an accounting are claims for remedies, not independent causes of action. Because the Court has granted summary judgment on Plaintiff's only remaining substantive claim, the Eleventh and Twelfth Claims are dismissed. In addition, because the Court has granted Defendants' Motion for Summary Judgment, it is unnecessary to rule on Defendant's Motion for Partial Summary Judgment or Defendant's motion to Strike Plaintiffs' Demand for Trial by Jury.

GRANTED as to all remaining claims in this action.

SO ORDERED.

DATED: /s/Oct 6, 1997

/s/

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

Case No. CV94-3927-ABC (AJWx)
Date: October 17, 1997

Title: Yerkovich v. MCA, Inc.

DOCKET ENTRY

PRESENT: Hon. Audrey B. Collins, United States District Judge

Daphne Alex	Not Present
Deputy Clerk	Court Reporter

ATTORNEY(S) FOR PLAINTIFF(S):	ATTORNEY(S) FOR DEFENDANT(S):
None	None

PROCEEDINGS: Plaintiffs' Motion for Reconsideration of Magistrate's Decision (In Chambers)

On October 3, 1997, Plaintiffs filed a Motion for Reconsideration of the Magistrate's Decision, in which Plaintiffs contended that various rulings made by Magistrate Judge Wistrich contended that various ruling made by Magistrate Judge Wistrich in his Orders of September 29 and 30, 1997 in the above-entitled matter were clearly erroneous and contrary to law - - the standard of review2 for a magistrate judges decision as set forth at 28 U.S.C. § 636 (b) (1) (A). Defendants filed their Opposition to the Motion on October 10, 1997, and

Plaintiffs filed their Reply on October 14, 1997. The matter was then taken under submission.

Having read and considered all the pleadings and exhibits pertaining to this motion, the Court finds that plaintiffs have manifestly failed to demonstrate that the Magistrate Judge's orders are clearly erroneous or contrary to law. The court notes the thoroughness and thoughtfulness which the Magistrate Judge brought to bear upon this matter during extended oral argument on September 22, 1997. The Court has also considered the precision and attention to detail with which the September 29 and 30, 1997 Orders are crafted.

The parties apparently disagree as to whether the Robert Bradley deposition was before the Magistrate Judge when he made his rulings. (See Opposition at fns. 3 and 5; Reply at p. 8 and fn. 3). The Court is unable to resolve this dispute, but noes that is denial of the motion remains the same whether or not the Court did not consider the Plaintiffs' citation to the Charles Larsen deposition, which was undisputable not before the Magistrate Judge when he ruled.

Plaintiffs argue for the first time in their Reply that a different standard of review – abuse of discretion – should be used to review the Magistrate Judge's orders. It is, of course, improper to raise a new standard of review for the first time in a Reply. In addition, the Court finds that the standard now argued by Plaintiffs is incorrect. However, the Court would also deny the Plaintiffs' Motion if it was reviewed under the abuse of discretion standard.

Because the Court agrees with the Defendants that affirmance of the Magistrate Judge's orders is not even a close question, the Court deems it unnecessary to summarize ad review each individual discovery request denied by the Magistrate Judge.

The Motion for Reconsideration is DENIED.

Copies to :

Judge Collins

Counsel of Record Deputy Clerk _____/s/_____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Anthony Yerkovich, et al.,	) CASE NO.: CV 94-3927 ABC (AJWx)
Plaintiffs,	) ORDER RE: Plaintiffs' Motion for Reconsideration of Orders . . .
vs.	)
MCA, Inc., et al.,	)
Defendants	)

After reviewing the materials submitted by the parties and the case file, it is hereby ORDERED that the Motion for Reconsideration of Plaintiffs ANTHONY YERKOVICH and BUFFALO PRODUCTIONS, INC. is denied.

I. Factual and Procedural Background

The factual and procedural background of this action has been discussed in the Court's prior Orders and is well-known to the parties.

Plaintiffs filed the instant Motion for Reconsideration on January 12, 1998. On February 9, 1998, Defendants MCA, INC. and UNIVERSAL CITY STUDIOS, INC. filed their Opposition. Plaintiffs filed their Reply on February 16, 1998.

II. Discussion

A. Standard

Motions for Reconsideration are governed by Rule 7.16 of the Local Civil Rules of the Central District of California. Local Rule 7.16 provides that:

A motion for reconsideration of the decision on

> any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Local Rule 7.16

B. Analysis

Plaintiffs seek reconsideration of this Court's Orders which: (1) granted summary judgment in favor of Defendants on Planitffs' Third claim for relief; and (2) dismissed Plaintiffs' Second, Fourth, Ninth, and Tenth claims for relief.

1. Plaintiffs' Third Claim for Relief

Plaintiffs seek reconsideration of this Court's October 6, 1997 Order which granted Defendants' motion for summary judgment on Plaintiffs' Third claim for relief (breach of contract – for accounting). In granting summary judgment against Plaintiffs' Third claim for relief, this Court held that Exhibit B to the 1983 Agreement constituted part of the original contract between Plaintiffs and Universal. October 6, 1997 Order, at 10-14. This Court also held that Plaintiffs presented no competent evidence that any asserted ambiguous contract terms would result in Defendants owning additional monies to Plaintiffs. October 6, 1997 Order, at 15. In sum, this Court stated: "Plaintiffs have not presented any competent evidence to show that Universal has failed to properly account to them, or that any

additional monies are due to them under the 1983 Agreement." October 6, 1997 Order, at 20.

Plaintiffs assert three reasons why this Court should reconsider its Order which granted Defendants' summary judgment motion with respect to Plaintiffs' Third claim for relief. Each of these contentions is without merit.

First, Plaintiffs contend that this Court failed to consider facts relating to the interpretation of "net profits" definition. Motion at 12. Second, Plaintiffs argue that an unpublished decision of the California Court of Appeal, Veith v. MCA, Inc., No. B0900339 (Cal. App. October 31, 1997), held that the implied covenant of good faith and fair dealing was incorporated into all of Universal's agreements and that the breach of the covenant constituted a breach of contract. Reply at 10. Finally, Plaintiffs argue that Defendants' failure to participate in the discovery phase entitled Plaintiffs to a denial or continuance of the summary judgment motion to complete discovery. Motion at 32.

a. The Definition of "Net Profits"

Initially, the Court notes that at the October 6, 1997 hearing it instructed Plaintiffs that they could file a motion for reconsideration based on additional information or documents they received from the further limited discovery allowed by the Magistrate Judge. This court specifically stated:

> I'm only contemplating that there would be a motion for reconsideration based upon the materials to be given to you if it's going to make a difference. . . [T]he Court in several places indicated that even if Plaintiffs were right, it wouldn't make a difference. There would still be no profit. If the material provided to you by October 13, 1997 makes you feel in good faith that you can bring a motion for . . . reconsideration because it's really going to make

> a difference, then that motion . . . would be directed to that.

Decl. of Jeffrey I. Abrams, Exh. B at 71-72.

Plaintiffs' instant motion for reconsideration, however, fails to point to any material evidence obtained in the additional discovery which contradicts this Court's summary judgment ruling with respect to Plaintiffs' Third claim for relief. Further, Plaintiffs' motion merely makes the same arguments which Plaintiffs made, or could have made, in opposition to Defendants' motion for summary judgment. For this reason alone, the Court DENIES Plaintiffs' motion for reconsideration. Nevertheless, the Court will address the merits of Plaintiffs' motion.

Plaintiffs contend that this Court failed to consider facts relating to Plaintiffs' interpretation of "net profits." Motion at 12. Plaintiffs specifically contend that USA Network is a "Producer Company" and a "Distributor." Motion at 14-21. Thus, Plaintiffs argue that Universal failed to calculate gross receipts based on monies received from USA Network regarding the licensing of Miami Vice. Motion at 14.

Plaintiffs' argument ignores, however, that this Court's summary judgment ruling adopted Plaintiffs' presumption that USA Network was a "distributor" and a "Producer Company." October 6, 1997 Order, at 14 n. 8.[1] For this reason, Plaintiffs'

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[1]This Court, in its summary judgment Order, adopted Plaintiffs' definition of a "Producer Company" as defined in Exhibit B: "'Producer Company' is Producer or a company owning or controlling Producer, or owned or controlled by Producer or under common ownership or control with Producer or any Producer Company." October 6, 1997 Order, at 14 n. 8 (quoting Exhibit B, ¶(A)(g)). This Court also noted that Universal and Paramount equally shared ownership of USA Network. Id. at 16. Thus, Plaintiffs' new material fact – the annual report for MCA Inc. which lists USA Network as a subsidiary – is immaterial. See Exh. DDD.

purported reliance on new evidence to establish the USA Network as a distributor and Producer Company does not reflect a "manifest showing of a failure to consider material facts" or "a material difference in fact" from that previously presented to the Court. See Local Rule 7.16.

Even after adopting Plaintiffs' presumptions, this Court stated: "Plaintiffs have failed to present any admissible evidence to rebut the propriety of Universal's accounting." October 6, 1997 Order, at 15. Moreover, this Court rejected Plaintiffs' purported evidence relating to the accounting issue. This Court noted that Plaintiffs' expert,, William Adelmann, did not "adjust his estimated Miami Vice gross revenue from USA Network ($160 million) to reflect the fact that Universal was only entitled to half that sum ($80 million) because it shares ownership of USA Network equally with Paramount." October 6, 1997 Order, at 16. This Court also noted that Adelmann's opinion failed to account for any estimated costs incurred by the USA Network due to the exhibition of Miami Vice." October 6, 1997 Order, at 16. Finally, this Court noted that Adelmann improperly calculated actual production costs bases solely on hearsay statements and irrelevant information regarding the per episode production costs of Miami Vice and another television show. October 6, 1997 Order, at 16.[2]

Finally, Plaintiffs point to Adelmann's supplemental report which purportedly calculates net profits based on advertising revenues received by the USA Network for the

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[2]Plaintiffs argue that Universal presented no evidence of its relationship with Paramount. Thus, Plaintiffs contend that this Court could not accept Universal's statement that it was only entitled to half the revenue generated by USA Network. Motion at 27. Even without that argument, however, this Court unequivocally rejected Plaintiffs' purported expert opinion as based wholly on unsupported assumptions. See October 6, 1997 Order, at 15-17. This reason alone constituted sufficient grounds to grant summary judgment in Defendants' favor.

television show Murder She Wrote. See Exh. III. The only new evidence supporting Adelmann's report is an article from Daily Variety. Because that article provides advertising revenue for Murder She Wrote, rather than for Miami Vice, it is of no assistance in determining net profits for Miami Vice. A statement in a newspaper article as to gross advertising revenue for another television show does not constitute material evidence of gross advertising revenue or net profits for Miami Vice.

Moreover, Adelmann's supplemental report fails to address the problems raised with his original report. This Court rejected Adelmann's original report because Adelmann based his opinion of unsupported assumptions that had no basis in the evidentiary record. See October 6, 1997 Order, at 17. As this Court previously noted: "Adelmann's calculation . . . does not constitute admissible opinion and, accordingly, does not raise an issue of fact." October 6, 1997 Order, at 17-18. Merely relying on a Daily Variety article relating to another television show does not state an appropriate ground for relief under Local Rule 7.16. Thus, the Court declines to consider Adelmann's supplemental report.

b. Veith v. MCA, Inc.

Plaintiffs argue that an unpublished decision of the California Court of Appeal, Veith v. MCA, Inc., No. B090339 (Cal.App. October 31, 1997), applies to Universal in this case. Plaintiffs assert that Veith held that "the implied covenant of good faith and fair dealing was incorporated into all of Universal's agreements, and the breach of the same constituted a breach of contract." Reply at 10. Plaintiffs specifically content that this Court failed to consider evidence of Universal's bad faith and self-dealing. Motion at 29. This contention is without merit.

First, Plaintiffs' motion for reconsideration fails to address the Sixth claim for relief – breach of the implied

covenant of good faith and fair dealing – which this Court has already dismissed. Second, Plaintiffs have failed to offer any evidence that alleged self-dealing would have resulted in sufficient net profits such that Defendants would owe Yerkovich additional monies. Plaintiffs have failed to offer any new evidence and have not demonstrated "a manifest showing of a failure to consider material facts" under Local Rule 7.16. Thus, they are not entitled to reconsideration of the Court's summary judgment ruling.

c. Discovery

Finally, Plaintiffs argue that Defendants' failure to participate in the discovery phase entitled Plaintiffs to a denial or continuance of the summary judgment motion to complete discovery. Motion at 32. Plaintiffs have unsuccessfully raised this claim on several prior occasions and the Court again finds that Plaintiffs' claim is without merit.

Plaintiffs disregard the fact that this Court denied both of Plaintiffs' motion to reconsider Magistrate Judge Wistrich's discovery Orders. Plaintiffs also ignore the fact that this Court granted them additional time, beyond the discovery cut-off date, to receive and review limited discovery ordered by the Magistrate Judge. Despite having the benefit of this additional time, Plaintiffs have presented no new material evidence which calls into question the validity of this Court's summary judgment ruling.

Although Plaintiffs cite to Federal Rule of Civil Procedure 56(f),[3] Plaintiffs did not bring a motion under Rule

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[3]Rule 56(f) provides that if a party opposing summary judgment demonstrates inability "for reasons stated [to] present by affidavit facts essential to justify the party's opposition," the Court may deny the motion for summary judgment or continue the hearing to allow additional discovery, or to "make such other order as is just." Fed.R.Civ.P. 56(f); Bianco v. H.F. Ahmanson & Co., 897 F.Supp. 433,

56(f) in their Opposition to Defendants' summary judgment motion. See October 6, 1997 Order, at 18. See also Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) ("References in memoranda . . . to a need for discovery do not qualify as motions under Rule 56(f)."). Moreover, as this Court noted in its summary judgment Order, on August 25, 1997, the parties filed a stipulation to continue the discovery cut-off to October 3, 1997. Plaintiffs did not seek any extensions of the discovery cut-off. See October 6, 1997 Order, at 20 n.14.

For these reasons, Plaintiffs have not stated an appropriate ground for relief under Local Rule 7.16 with respect to Plaintiffs' Third claim for relief.[4]

2. Plaintiffs' Second, Fourth, Ninth, and Tenth Claims for Relief

Plaintiffs seek reconsideration of this Court's Orders which dismissed Plaintiffs' Second, Fourth, Ninth, and Tenth claims for relief. Plaintiffs assert that the unpublished decision of the California Court of Appeal, Veith v. MCA, Inc., No.

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438 (C.D. Cal. 1995).

[4]Plaintiffs also assert that this Court failed to consider facts relating to the scope of the contract between the parties. Motion at 31. Plaitniffs argue that the evidence reflects that the Net Profits definition was not part of the agreement between the parties. This Court has unequivocally rejected this claim in its summary judgment ruling. See October 6, 1997 Order, at 10-14. This Court found that Plaintiffs' disavowal of Exhibit B "directly contradicts certain admissions and statements made by Plaintiffs." Id. at 10-11. Moreover, this Court found that Plaintiffs are bound by Exhibit B because it was specifically incorporated by reference into the 1983 Agreemnet." Id. at 13. Plaintiffs have offered no new evidence and have not demonstrated a "manifest showing of a failure to consider material facts." Local Rule 7.16(c). Thus this claim does not state and appropriate ground for reconsideration.

B090339 (Cal. App. October 31, 1997), collaterally estopped Universal from relitigating the issue of arbitrability in this case. Motion at 9. "Yerkovich's argument is that Universal must be collaterally estopped from taking the position in this action that Yerkovich's 2nd, 4th, 9th, and 10th claims are subject to arbitration since FINAL judgment was entered against Universal on this very issue in the Veith action." Reply at 4 (footnote omitted). Plaintiffs' claim is without merit.

a. Second Claim for Relief

This Court dismissed Plaintiffs' Second claim for relief, which sought a declaration that Yerkovich was not bound by the "arbitrability arbitration." See December 5, 1996 Order, at 8-10. This Court noted that Plaintiffs' Second Amended Complaint asserted a declaratory relief claim based on Universal's alleged breaches of the CBA. December 5, 1996 Order, at 8. Plaintiffs' Third Amended Complaint, however, alleged claims based on Plaintiffs' individual contract. This Court stated that "Plaintiffs now disavow any alleged breaches of the CBA." December 5, 1996 Order, at 8. Thus, in dismissing Plaintiffs' Second claim for relief, this Court concluded that it saw "no evidence of [an] actual and justiciable controversy between adverse parties." December 5, 1996 Order, at 10.

As an initial matter, this Court signed the judgment confirming the arbitration award on May 15, 1996 – before the Veith decision became final. See December 5, 1996 Order, at 3. Thus the Veith decision is irrelevant to Plaintiffs' Second claim for relief. Moreover, as noted above, this Court dismissed Plaintiffs' Second claim for relief based on Plaintiffs' disavowal of any alleged breaches of the CBA. This Court did not base its decision on a determination of arbitrability. See December 5, 1996 Order, at 8-9. Finally, the Veith decision, like the instant case, did not decide issues of arbitrability of CBA-based claims. Rather, both Yerkovich and Veith disclaimed any reliance on

alleged breaches of the CBA. See Veith, Exh. AAA, at 28 n. 24 (noting that Veith did not rely on the CBA for a remedy for Universal's alleged breach of the Agreement"; id. ("Veith insisted that he was not proceeding under the CBA.").[5]

Veith has no applicability to Plaintiffs' Second claim for relief and Plaintiffs have not stated an appropriate ground for relief under Local Rule 7.16. For these reasons, the Court DENIES Plaintiffs' motion for reconsideration with respect to Plaintiffs' Second claim for relief.

a. Fourth, Ninth, and Tenth Claims for Relief

This Court granted Defendants' Alternative Motion for Summary Judgement with respect to Plaintiffs' Fourth claim for relief (breach of contract). February 24, 1997 Order, at 27. This Court held that the statute of limitations barred Plaintiffs' claims, including the Fourth claim for relief, of unconscionability. See February 24, 1997 Order, at 25. This Court also noted that Plaintiffs Fourth claim for relief fails because the Yerkovich-Universal Contract stated that "'all rights in such material, including copyrights therein' were assigned to Defendants.'" February 24, 1997 Order, at 25.

This Court also granted Defendants' Amended Motion for Judgement on the Pleadings as to Plaintiffs' Ninth (copyright infringement) and Tenth (declaration of copyright ownership) claims for relief. Id. This Court held that these claims failed because the Court had ruled that Plaintiffs' unconscionability

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[5]Plaintiffs also make the claim that "Universal never demanded arbitration of Yerkovich's claims" Motion at 10. Plaintiffs cannot dispute that Universal participated in arbitration and filed a Petition to Confirm Arbitration Award. December 5, 1996 Order, at 3. Universal also filed a stipulation for Entry of Final Judgment Confirming the Arbitration Award. Id. It was Plaintiffs, however, who switched their theory to allege violation of Plaintiffs' individual contacts rather than breaches of the CBA.

claims were barred by the applicable statute of limitations. February 24, 1997 Order, at 25.

Plaintiffs contend that this Court, in granting summary judgment against Plaintiffs' Fourth, Ninth, and Tenth Claims, "indicated that these claims were subject to the mandatory arbitration provisions of the CBA." Motion at 9. This contention is wholly without merit. This Court's Order contains no such express or implied finding. Rather this Court stated that "Plaintiffs are . . . judicially estopped from arguing an inherently inconsistent position" based on Plaintiffs' express denial that their claims are based on the CBA.[6] See February 24, 1997 Order, at 24.

This Court determined that Plaintiffs' claims were based on breach of the individual contract rather than the CBA and necessarily were not subject to the CBA's mandatory arbitration provisions. Moreover, this Court unequivocally reiterated its previous ruling: "[T]o the extent that Plaintiffs assert a claim for breach of contract (and not the CBA), this claim fails because Plaintiffs assigned all rights not protected by the CBA to Defendants." February 24, 1997 Order, at 25 (quotation omitted). Plaintiffs make no colorable claim that Veith has any applicability to the instant action.

For these reasons, the Court DENIES Plaintiffs' motion for reconsideration with respect to Plaintiffs' Fourth, Ninth, and Tenth claims for relief.

III. Conclusion

For all these reasons, the Court hereby ORDERS that Plaintiffs' Motion for Reconsideration is DENIED as Plaintiffs have failed to demonstrate appropriate grounds for relief under Local Rule 7.16.

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[6]Plaintiffs' repeated mischaracterization of this Court's prior Orders, as well as the tone taken in the instant papers, reflects a continued lack of respect for this Court.

SO ORDERED.
Dated: February 20, 1998

/S/
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

No. 98-55660

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY YERKOVICH and BUFFALO PRODUCTIONS, INC.

Plaintiffs/Appellants

v.

MCA INC. and UNIVERSAL CITY STUDIOS, INC.

Defendants/Appellees

Appeal from Judgment of the United States District Court
Central District of California
Honorable Audrey B. Collins, Judge
Civ. No. 94-3927 ABC (AJWx)

APPELLANTS' OPENING BRIEF

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I.
INTRODUCTION

In a series of confusing, inexplicable and legally incorrect decisions, the District Court below completely foreclosed Plaintiffs/Appellants (hereafter "Yerkovich") from having their day in court. In order to accomplish this result, the District Court used twisted logic and ignored any facts or law which supported Yerkovich's positions.

One of the most egregious examples of the District Court's many errors is the fact that the District Court granted a Summary Judgment based upon Yerkovich's failure to provide certain evidence while simultaneously denying Yerkovich's Motion to Compel that very same evidence! The District Court never even attempted to explain its rationale for arriving at this absurd result in any of its various written decisions.

After enduring many frustrating years of Universal's procedural gamesmanship, stalling, suppression of evidence, and assorted unprofessional tactics, Yerkovich is anxious to have his claims reviewed by this Court. After the requisite *de novo* review of the matters below, this Court can only conclude that the District Court made an inordinate amount of very serious errors. The District Court's rulings must be reversed.

* * *

V.
STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Parties

Anthony Yerkovich is a professional writer and producer, and Buffalo Productions, Inc. is his personal services corporation. (YE 1958 ¶1). Yerkovich is the creator and writer

of one of the most famous and ground breaking television programs of all time, *Miami Vice*. (YE 1958 ¶1]).

Defendants/Appellants ("Universal") entered into an agreement with Yerkovich in 1983 (the "Agreement") whereby Yerkovich granted Universal certain rights with regard to any television programs he created. (YE 1678 ¶ 5(D)(1) and YE 1691 ¶ 3). The Agreement provided for Yerkovich's services as a writer, producer , and director of the television series. (YE 1676 ¶ 1(A)).

B. Universal's Failure to Pay Net Profits as Provided in the Agreement

One of the issues in the District Court was whether Universal had to account to Yerkovich for the monies received by one of Universal's companies - the USA Network with regard to *Miami Vice*. The District Court ultimately accepted Yerkovich's interpretation of the net profits definition, thus implicitly finding that that Universal DID have to account for revenues received by the USA Network as a "Producer Company" under the terms of the net profits definition. The District Court inexplicably refused to order Universal to produce this information to Yerkovich, however, and also refused to consider Yerkovich's estimates of the same - even though Yerkovich could not obtain the actual amounts since the same were being withheld from him by Universal. (YE 1983-1984 ¶¶ 24-27]).

C. Universal's Self-Dealing With Regard to *Miami Vice*

Another issue in the District Court was whether Universal's license of *Miami Vice* to its own company - the USA Network - constituted a breach of the Agreement and/or an infringement of Yerkovich's copyrights.[7] Universal sold

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[7]For a detailed discussion of the development of cable networks and the syndication of television shows thereon, see YE 1962-1967).

Miami Vice to its own cable network - the USA Network - at a reduced rate. This enhanced the value of one of Universal's assets at the expense of profit participants, such as Yerkovich.

D. The Theme Park Attraction

Another aspect of Yerkovich's action centered around the Universal theme park. When Yerkovich and Universal entered into the Agreement, Yerkovich retained all of the rights to his literary property (i.e. *Miami Vice*) with regard to, *inter alia,* dramatic stage presentations. (YE 1678 ¶ D(1) and YE 1691 ¶3). Yerkovich maintained that Universal breached the agreement and infringed Yerkovich's copyrights by exhibiting a live stage production of *Miami Vice* at Universal's theme park without Yerkovich's consent.

E. The Background of the Action In the District Court

In order to place this action in perspective, the history of the conduct of this action is necessary since some of the issues involved herein deal with Universal's gamesmanship and unfair litigation tactics.

This action was filed on June 10, 1994 (YE 1-11). In October, 1994, Yerkovich filed a First Amended Complaint ("FAC") (YE 12-25), and on October 11, 1994, Universal requested an extension to November 22, 1994 to respond. (YE 26-27).

On November 1, 1994, Universal initiated an arbitration between itself and the Writer's Guild of America ("WGA), purportedly seeking to determine the arbitrability of Yerkovich's claims. (YE 2984-2994).

Universal requested, and was granted, another extension of time to respond to the FAC until December 2, 1994. (YE 28-29).

Universal responded to the FAC on December 1, 1994 by filing a Motion to Dismiss the Seventh Claim of the FAC (Antitrust) (YE 30-78, 85-113). On January 3, 1995, Universal filed a Motion to Stay the remaining claims pending an

"arbitrability arbitration." (YE 83). Meanwhile, on February 23, 1995, the WGA filed a Motion to Intervene in the action. (YE 82).

On April 19, 1995, the District Court granted Universal's Motions, but denied the WGA's Motion to Intervene (finding that Universal and the WGA's interests were aligned and therefore intervention was not necessary). (YE 114-131).

Thereafter, the "arbitrability arbitration" was held between Universal and the WGA. Yerkovich was not a party to that "arbitrability arbitration" proceeding. YE 2984-2994).

On November 3, 1995, Edgar Jones (the "arbitrability arbitrator") issued a decision that Yerkovich's claims were subject to arbitration to the extent that the same relied upon the CBA. (YE 2984-2994).

On March 4, 1996, Yerkovich filed a Second Amended Complaint ("SAC") (YE 132-146).

Meanwhile, Universal had instituted a separate action against the WGA to confirm Jones's decision. (YE 2997-3000).

On April 8, 1996, the parties stipulated to lift the stay in the action below. (YE 147-150).

The WGA and Universal then stipulated to the entry of a judgment in the **separate** action, confirming this arbitration decision on or about May 14, 1996. (YE 2941¶ 9).

Also on May 14, 1996, Universal filed a Motion to Dismiss the First and Second Claims of the SAC (YE 162-330), and on June 26, 1996, this District Court granted that Motion and provided Yerkovich leave to amend. (YE 331-349). On July 24, 1996, Yerkovich filed his Third Amended Complaint ("TAC") (YE 351-373), adding the WGA as a defendant.[8]

On September 5, 1996, Yerkovich propounded his First

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[8]Yerkovich and the WGA eventually stipulated to dismiss the WGA without prejudice, agreeing to toll the statute of limitations. (YE 783).

Set of Requests for Production of Documents. (YE 3001-3014). Universal requested, and was granted, an extension of time to respond to same until October 16. (YE 3015-3016).

On September 12, 1996, Universal made a Motion to Dismiss the TAC. (YE 376-781). On December 5, 1996, the District Court granted the Motion with respect to the 2nd claim, without leave to amend. (YE 786-808).

Yerkovich served his Second Set of Requests for Production of Documents on December 9, 1996. (YE 3017-3039). Universal filed a Motion for Judgment on the Pleadings on December 23, 1996 and an Amended Motion on January 7, 1997 together with a Motion for Summary Judgment (YE 821, 826-985, 986-1029, 1034 - 1264) . On December 27, 1996, Universal requested a stay in discovery. (YE 822-823). The Court granted Universal's application and stayed discovery until after the Court's ruling on the pending Motions. (YE 824-825).

Thereafter, Universal refused to participate in the Local Rule 6 meeting of counsel. (YE 3040-3047). Ultimately, Yerkovich filed his own Rule 6 statement on January 28, 1997. (YE 1265-1277).

On February 24, 1997, the District Court granted Universal's Motions with respect to the 4th, 9th, and 10th claims, leaving only the 3rd Claim (breach of contract).[9] (YE 1288-1314).

Also on February 24, 1997, Yerkovich requested responses to the outstanding discovery since the Court had then ruled on the Motions. (YE 3046). Universal responded on March 5, 1997 by requesting that Yerkovich agree to forego formal discovery and conduct an "audit" of Universal's books and records. (YE 3048).

Yerkovich propounded a First Set of Interrogatories

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[9]The Court reserved judgment on the "remedy" claims (11 and 12).

and a Third Set of Requests for Documents on March 10, 1997. (YE 3049-3068).

On April 7, 1997, the parties filed a Joint Status Report wherein Universal's "audit in lieu of formal discovery" request was outlined. Yerkovich indicated that he was NOT willing to forego formal discovery, and at the status conference on April 14, 1997, Yerkovich's counsel reiterated that Yerkovich would not forego formal discovery even if he agreed to conduct an "audit". (YE 3070-3076).

On April 21, 1997, Yerkovich requested another "meet and confer" with regard to the outstanding discovery. (YE 3077). Universal did not respond to this letter until May 6, 1997 stating that Universal would not meet and confer until after it had received a transcript of the April 14, 1997 status conference. (YE 3078).

Even though the case had already been pending for nearly three years, this was also the first time that Universal provided a profit participation statement to Yerkovich. (YE 307 and 2943 ¶ 18).

On May 8, 1997, Yerkovich filed a Motion to Compel (YE 1315-1476), and on June 6, 1997, the District Court granted this Motion. (YE 1477). On June 18, 1997, Yerkovich requested that he be allowed to send an accountant to Universal to inspect its books and records and to verify the figures reported on the profit participation statement. (YE 3079). Universal instead indicated that it would make documents available at its counsel's offices (YE 3080), and on June 23, 1997, Universal "responded" to the outstanding discovery by interposing mostly objections. (YE 3081-3157).

On July 2, 1997, Yerkovich was finally able to review certain documents, but Yerkovich did not obtain copies of these documents until the middle of July, 1997. (YE 2944 ¶20). On July 31, 1997, Yerkovich served a Fourth Set of Requests for Documents and a Second Set of Interrogatories. (YE 3158-

3178). On August 7, 1997, Yerkovich demanded yet another "meet and confer". (YE 3179-3181). Yerkovich also served notices of deposition of the Universal defendants pursuant to FRCP 30(b)(6), set for August 29, 1997 and September 1, 1997. (YE 3182-3191).[10] A "meet and confer" was held on August 18, 1997. (YE 3192-3193). Meanwhile, Universal raised the issue of possible settlement, and suggested that Yerkovich not pursue discovery motions pending these discussions. (YE 2944 ¶ 21]).

On August 21, 1997, Yerkovich served a Notice of Deposition together with a subpoena duces tecum on the USA Network. (YE 3199-3212). On August 26, 1997, Universal identified its experts, and Yerkovich immediately served Notices of Deposition. (YE 3214-3250).

On August 27, 1997, Yerkovich again requested that his accountant be allowed to examine Universal's books and records. (YE 3251-3252). Universal responded on August 28,1997, agreeing to produce certain documents but still refusing to produce others. (YE 3254-3256).

On September 2, 1997, Universal objected to Yerkovich's Interrogatories requesting the identity of Universal's witnesses, and refused to provide responses thereto. (YE 3257-3268). Even though the case had been pending for three years at this point and the Federal and Local Rules required the parties to disclose witnesses at the early meeting of counsel, Universal had still not disclosed any witnesses to Yerkovich. Yerkovich immediately sent a "meet and confer" letter to Universal in this regard. (YE 3269-3270).

Yerkovich filed other Motions to Compel on September 3, 1997. (YE 1479-1548, 1843-1850).

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[10]On September 3, 1997, Yerkovich was eventually forced to bring a Motion to Compel with regard to the majority of the categories requested in any event (i.e. all information regarding the USA Network).

It was not until September 5, 1997 - three months after Yerkovich had first made the request - that Universal finally gave Yerkovich the name of a contact at Universal, George Elian, to allow Yerkovich's accountant to inspect the books and records. (YE 3272). When Mr. Elian was contacted, however, he informed Yerkovich's accountant that no documents would be available until September 12, 1997. (YE 3274 ¶ 7).

On September 10, 1997, the parties held yet another "meet and confer". (YE 3277-3277.1). Thereafter, Yerkovich filed another Motion to Compel. (YE 1779-1842 and 1851-1864).

On September 12, 1997 (Friday before the scheduled Monday deposition), the USA Network served objections to the subpoena which had been served on August 21, 1997. (YE 3277). From the cover page that was apparently sent to Yerkovich by mistake, it can be seen that counsel for Universal prepared these objections for the USA Network. (YE3277.2 - 3294).

When Yerkovich's expert was finally allowed to go to Universal on September 17, 1997, he was not provided with all the documents that had been promised, was not allowed to make copies, and was not even provided with an adequate work space. (YE 1975-1977 ¶¶ 3-7 and 2349-2352).

On September 15, 1997, Universal filed a Motion for Summary Judgment. (YE 1550-1709). Between September 15, 1997 and September 22, 1997 (the date Yerkovich's Opposition was due), Universal filed no less than two ex parte applications and three additional motions and otherwise attempted to keep Yerkovich occupied with "busy work" - in an apparent attempt to divert Yerkovich's attention away from the Motion for Summary Judgment. (YE 1549, 1777, YE 1912, YE 1914, YE 1915).

On September 22, 1997, a hearing was held before Magistrate Judge Wistrich of the district court with regard to

Yerkovich's outstanding discovery concerning, among other things, the revenue received by the USA Network and the various agreements between Universal, Paramount, and the USA Network. (YE-RT 99-147).[11] On September 30, 1997, Magistrate Wistrich effectively and improperly granted summary judgment in Universal's favor by apparently adopting Universal's interpretation of the net profits definition (although never indicating his rationale one way or the other), refusing to compel the production of documents reflecting the relationship between Universal, Paramount, and the USA Network, and also refusing to order Universal to produce the revenue received by the USA Network with regard to *Miami Vice*. (YE 2392-2393).

Yerkovich filed Motions before the District Court for Reconsideration of Magistrate Wistrich's Orders and also filed a Motion to Compel the USA Network's compliance with the subpoena. (YE 2394-2602, 2661-2674, 2807-2816, 2675-2806 2871-2894). All of these Motions were ultimately denied. (YE 2869-2870, 2660, 2895-2896).

On October 6, 1997, the District Court granted the Motion for Summary Judgment (YE 2603-2624). Thereafter, the District Court refused to grant a reconsideration of Magistrate Wistrich's "de facto" summary judgment discovery orders (YE 2869-2870 and 2895-2896) even though the District Court had based its decision granting summary judgment upon the lack of the evidence Yerkovich was seeking, and even though the District Court adopted an interpretation of the net profits definition which was seemingly contrary to the Magistrate's! Neither the Magistrate nor the District Court Judge ever specified their reasons for denying Yerkovich's

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[11] "YE-RJ" refers to Yerkovich Excerpts of Record- Reporters Transcripts (Volume XVII). The page numbers refer to the excerpt pages and not to the original document pages.

discovery motions, however, providing instead blanket denials.

On January 12, 1998, Yerkovich made a Motion for Reconsideration of the District Court's Orders dismissing his claims and granting summary judgment. (YE 2897-4097). This Motion was denied on February 24, 1998, and the District Court also entered Judgment on that day. (YE 4098-4112).

On March 26, 1998, Yerkovich filed the Notice of Appeal. (YE 4113-4118).

VI.
SUMMARY OF ARGUMENT

The District Court dismissed all of Yerkovich's claims by virtue of granting various Motions during the course of the nearly four years the litigation was pending. One of the most egregious errors made by the District Court was its grant of a summary judgment as to Yerkovich's breach of contract claim on the ground that Yerkovich did not have certain evidence while simultaneously denying Yerkovich's Motion to Compel such evidence. The District Court erred by granting the Motion for Summary Judgment when there were clearly issues of fact remaining.

The District Court also erred in dismissing Yerkovich's copyright claims and a another breach of contract claim on the ground that Yerkovich had assigned all of his copyright interests to Universal. The District Court misinterpreted the plain language of the Agreement and also misstated Yerkovich's arguments in its Order granting Universal's Motion to Dismiss these claims. Yerkovich had not assigned all of his copyright interests to Universal, and an interpretation of the CBA was not necessary to determine the same. Additionally, the District Court erred by finding that Yerkovich's unconscionability allegations were time-barred. The requisite *de novo* review of the District Court's decisions in this regard can only lead to reversal.

Yerkovich's Breach of Fiduciary Duty Claim was also dismissed by the District Court when it granted Universal's Motion under FRCP 12(b)(6). In dismissing this claim, the District Court relied upon inapplicable caselaw and ignored the one case which was nearly on point. As set forth in the pleadings, Yerkovich and Universal had a classic fiduciary relationship - Yerkovich assigned Universal certain exclusive rights in his literary properties in exchange for a percentage of the profits generated by Universal's exploitation of those rights, and the parties did not have an arm's-length transaction.

The District Court also dismissed Yerkovich's Fraud and Breach of the Implied Covenant of Good Faith and Fair Dealing Claims by granting Universal's Motion to Dismiss under FRCP 12(b)(6). Like the Fiduciary Duty claim, these claims were also well-pleaded, and the District Court simply ignored Yerkovich's pleading and making factual and legal conclusions as to the alleged merits of the claims.

Finally, the District Court dismissed Yerkovich's Antitrust claim even though Yerkovich had properly pleaded a claim for relief. The District Court again ignored the pleading and the caselaw which supported Yerkovich.

The decisions of the District Court must be reversed.

VII.
ARGUMENT

A. The District Court Erred In Dismissing Yerkovich's Third Claim for Breach of Contract

In reviewing whether a district court erred in granting a Motion for Summary Judgment:

> The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party [in this action,

> Yerkovich], whether genuine issues of material fact exist and whether the district court properly applied the relevant substantive law.

Bagdadi, 84 F.3d at 1197. In this action, when viewing the evidence in the light most favorable to Yerkovich, it is apparent that genuine issues of material fact exist regarding whether Universal's profit participation statement was accurate. The District Court erred in granting the Motion and should be reversed.

Universal moved for Summary Judgment with regard to Yerkovich's Third Claim for Breach of Contract. (YE 1550-1709, 1916-2251, 2324-2389) The only issue raised by Universal's Motion was whether Universal's profit participation statement was correct. (YE 1551:12-21).

1. A Question of Fact Existed as to the Amount of Revenues Received by the USA Network

Universal was to account to Yerkovich for "net profits." (YE 1678 ¶ 5(D)(1)). In calculating net profits if "Exhibit B" was part of the Agreement, Universal was to first account for all "gross receipts" and thereafter deduct various expenses to arrive at the "net profits" figure. (YE 1686 ¶A(a)). As shown herein, Yerkovich presented evidence to show that Universal had not accounted to Yerkovich for all of the "gross receipts" - namely, Universal had not accounted to Yerkovich for the monies received by the USA Network, and under Yerkovich's interpretation of the net profits definition, Universal had a duty to do so.

The evidence presented showed that the net profits definition is ambiguous at best and could not be interpreted without an analysis of extrinsic evidence. Namely, Yerkovich

demonstrated that the definition of "gross receipts" under the terms of the net profits definition is uncertain. Therefore, for purposes of determining a summary judgment, the District Court had to accept the interpretation of the non-moving party. *Sicor Limited v. Cetus Corporation*, 51 F.3d 848, 856 (9th Cir. 1995).

Additionally, the net profits definition had to be construed against Universal as the drafter of the same. California Civil Code § 1654.

In the District Court's Order granting summary judgment, it was not clear to Yerkovich whether the District Court had accepted his interpretation of the net profits definition. Because the District Court later denied Yerkovich access to the information which would have overcome summary judgment had his interpretation been accepted, Yerkovich brought a Motion for Reconsideration. In its Order denying the Motion for Reconsideration, however, the District Court affirmatively indicated that it DID accept Yerkovich's interpretation of the net profits definition for purposes of the Motion (YE 4101:23-25).

This made Yerkovich all the more confused since the Court had denied Yerkovich access to the information necessary to rebut Universal's accounting numbers and further criticized Yerkovich for failing to come forward with the very evidence that the District Court denied him - namely, the revenues received by the USA Network regarding *Miami Vice*. (YE 4102-4104).

The District Court's refusal to compel Universal to provide an accounting of the USA Network's gross receipts, coupled with its grant of the summary judgment, based on the lack of that very evidence, warrants reversal.

a. The Evidence Presented by Yerkovich Supported His Interpretation of the Net Profits Definition

Under "Exhibit B" (the document which was purportedly

attached to the Agreement when Yerkovich signed it), there are two types of "gross receipts" regarding the USA Network for which Universal had to account to Yerkovich: 1) monies received **from** the USA Network regarding the licensing of *Miami Vice*; and 2) revenues received **by** the USA Network regarding *Miami Vice*. On Universal's accounting statement (YE 1609-1619), Universal included only monies received **from** the USA Network. (YE 1609-1619). Since the District Court adopted an interpretation of the net profits definition which compelled Universal to account to Yerkovich for the monies received BY the USA Network as well as FROM the USA Network, the District Court should have denied Universal's summary judgment motion based upon Universal's failure to so account.

Under "Exhibit B", where a Producer Company" distributes the "photoplays", the gross receipts of that "Producer Company" are deemed to be the gross receipts of the "Producer" (here Universal) (YE 1686 ¶ A(b)(4)).

1). The USA Network is a "Producer Company"

Under "Exhibit B", "Producer Company" is defined as:

> Producer [Universal] or a company owning or controlling Producer, or owned or controlled by Producer or **under common ownership or control with Producer**, except any publishing subsidiary wholly or partially owned by Producer or any Producer Company.

(YE 1689 ¶ A(g) (emphasis added)). Yerkovich presented substantial evidence to show that the USA Network certainly fits within this definition. (YE 1967 ¶17, 1971 ¶ 4], 3558:18 - 3561:7, 3852:17 - 3854:12, 3973:18 - 3974:4, 3976:11 -

3977:18).[12]

Additionally, the plain meaning of the words can only lead to this conclusion as well. When interpreting a contract, words are generally to be given their ordinary meaning. Cal.Civ.Code § 1644. Webster's Dictionary defines "common" as: "Belonging to, shared by, or applying equally: JOINT." (YE 2029). Since the USA Network and Universal both "belong to" or are "shared by" MCA, it is clear that these two entities are "under common ownership" - namely MCA. Finally, in the annual report filed by MCA Inc., the USA Network is listed as a "subsidiary". (YE 3452-3454).

2). The USA Network is a Distributor

A). Universal's Own Agreement With the USA Network Describes USA as a Distributor

In the agreement between the USA Network and Universal regarding *Miami Vice* (the "USA/Universal Agreement"), the USA Network is referred to as a distributor. (YE 2049 ¶ 1 (a)). Paragraph 12 of the USA/Universal Agreement also discusses "films which are **DISTRIBUTED**" by the USA Network. (YE 2060 ¶12). (first sentence of the second paragraph - emphasis added]).

The USA/Universal Agreement further describes NBC - the television network which originally aired *Miami Vice* - as a distributor. (YE 2066 ¶24). Universal's own witnesses have analogized the television networks, like NBC, to cable networks, like the USA Network. (YE 3578:17-3591:3, 3870:1-20, 3889:1 - 3990:20) Yerkovich's witnesses also testified to this issue. (YE 1966-1967 ¶15, 1973 ¶8], 1960

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[12] Although Yerkovich submitted these deposition excerpts with his opposition to the Summary Judgment (YE 2070-2251), the official cites were not yet prepared. Therefore, for the ease and convenience of this Court, Yerkovich's citations to depositions are from the Motion for Reconsideration.

¶16]).

B). The Common Meaning of the Word "Distribute" Supports Yerkovich's Interpretation

Applying an "ordinary" and "popular" definition to the meaning of the word "distribute", there can be no doubt that the USA Network is a distributor. Webster's Dictionary defines "distribute" as: "To divide and dispense in portions"; "To deliver or give out"; and "To diffuse or spread over an area". (YE 3445). Pursuant to testimony from both Universal's and Yerkovich's witnesses, and pursuant to common sense, this is exactly what the USA Network does - i.e. "dispenses" or "delivers" a cable signal. (YE 3578:17-3591:3, 3870:1-20, 3889:1 - 3990:20, 1966-1967 ¶15, 1973 ¶8, 1960 ¶6).

C). The Testimony of Yerkovich's and Universal's Witnesses Supports This Interpretation

The Court also failed to consider the substantial testimony of witnesses presented by Yerkovich which supports his interpretation that the USA Network is a distributor. (YE 3578:17-3597:24, 3910:24-3911:22, 3861:22 - 3916:3).

None of Universal's witnesses were able to name a single document which described the USA Network as an "exhibitor". (YE 3880:6-3882:18). Additionally, Yerkovich's witnesses testified that the USA Network is a distributor. (YE 1960 ¶16, 1966-1967 ¶15, 1973 ¶4).

D). The Evidence Shows that the Industry Refers to the Cable Networks as Distributors

Applying an "industry" definition to the word "distribute" also leads to the conclusion that the USA Network is a distributor. Yerkovich presented articles from the industry trade publication *Daily Variety* and from the *Los Angeles Times* which both referred to the USA Network as a distributor. (YE 3455-3462).

Additionally, as stated in the Congressional findings of the Cable Television Consumer Protection and Competition Act

of 1992 (47 U.S.C. §§ 521, et seq.), cable networks are routinely referred to as distributors throughout.

A local cable company, Century Cable, in a pamphlet, also referred to cable networks as distributors. (YE 3463-3466).

Thus, the evidence was overwhelming that cable systems are known as distributors in the "industry".

3). Net Profits Definitions Used By Universal Since the Time The Universal and Yerkovich Entered Into Their Agreement Carve Out an Exception for the USA Network

Also supporting Yerkovich's interpretation was the fact that in net profits definitions used by Universal subsequent to the one which Universal sought to have held binding upon Yerkovich, monies received by the USA Network are specifically excluded from the definition of "gross receipts". (YE 3506:20-25, 3509:22-3511:22. This fact certainly raised the inference that these monies were included in the net profits definition at issue herein or Universal would not have had to carve out such an exception in later net profits definitions.

Universal, as shown below, failed to produce these other documents, and the Court refused to order the same to be produced. Thus, an adverse inference should certainly have been drawn against Universal in this regard as discussed below.

b. An Adverse Inference Should Be Drawn Against Universal For Failing to Provide Documents and Information to Yerkovich

In determining whether to grant a summary judgment, all reasonable inferences had to be drawn in Yerkovich's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). The District Court in this action erred by failing to do so and failing to draw adverse inferences against Universal based upon Universal's failure to produce documents and other information to Yerkovich. The Court should have concluded

that the same would have been adverse to Universal and drawn an inference in favor of Yerkovich.

In the case of *Thomas v. Gusto Records, Inc.*, 939 F.2d 395 (6th Cir. 1991), cert. denied 502 U.S. 984, 112 S.Ct. 591 (1991), the court drew an adverse inference against the defendants based upon the defendants' failure to provide evidence of their profits - even though the defendants asserted a legitimate privilege and their Motion to Quash the subpoena requesting such records was granted. *Id.* at 401-402.

In this action, Universal had no legitimate rationale for failing to produce evidence relating to the USA Network's income for *Miami Vice*, and its failure to do so should have resulted in an adverse inference being drawn against Universal. Instead, the District Court rewarded Universal for behavior which was worse than that exhibited by the defendants in the *Thomas* case.

Further, Magistrate Judge Wistrich, in refusing to compel Universal to produce this information, exceed the scope of his authority and improperly granted a "de facto" summary judgment in Universal's favor on this issue. 28 U.S.C.§ 636(b)(1)(A). Magistrate Wistrich conceded that the language of the net profits definition was "quite broad", but that Yerkovich's interpretation seemed "counter intuitive". (YE-RT 129:18 - 130:6). It was not up to Magistrate Judge Wistrich to make such determinations on a discovery Motion. See, e.g. *Geophysical Systems Corp. v. Raytheon Company, Inc.*, 117 F.R.D. 646, 647 (C.D. Cal. 1987). Indeed, it was beyond Magistrate Judge Wistrich's jurisdiction to make a determination on a summary judgment (28 U.S.C. § 636(b)(1)(A)), yet that is exactly what he did - even though Yerkovich's counsel requested that Magistrate Judge Wistrich hold off ruling on the discovery motions until after the Court ruled on the summary judgment. (YE-RT 134:12-18, 143:11-24, 144:3-146:20).

Interpreting ambiguous language contained in an

agreement and considering extrinsic evidence to do so are sole functions of a jury after a full trial on the merits. *Sicor*, 51 F.3d at 856. The District Court, by later "rubber stamping" Magistrate Judge Wistrich's decisions, simply adopted his improper "de facto" grant of summary judgment - which was peculiar since the District Court based its grant of the summary judgment upon the lack of the very evidence which Yerkovich was seeking through the discovery motions and since the District Court apparently adopted an interpretation of the net profits definition which was apparently contrary to the Magistrate's - who recognized at the hearing that if he did not accept Yerkovich's interpretation, he would not have to compel the production of those documents. (YE-RT 125:11-25)

Universal also failed to produce the "back up" for the figures reported on its profit participation statement, YE 1975-1977, 1985 ¶31) - the document upon which Universal based its entire Motion for Summary Judgment. Without these supporting documents, there was no way for Yerkovich or the District Court to verify the figures reported by Universal. Despite Universal's insistence that it had made these documents available, it was even clear from the declarations Universal submitted in support of its Motion that these documents had not been made available. (YE 2349-2352). Because this profit participation statement was merely a summary prepared for litigation (YE 3562:16 - 3570:22), Universal was under a duty to produce the underlying source documents to Yerkovich. Fed.R.Evid. 1006. Universal's failure to do so - for whatever reason - should have raised an adverse inference and defeated the summary judgment. *Thomas*, supra.

c. Yerkovich's Estimates of Advertising Revenues Should Have Been Considered Since Universal Failed to Provide the Actual Figures

The District Court criticized Yerkovich's expert for relying upon estimates and "hearsay" to make his calculations of

the amount of net profits due to Yerkovich. The District Court ignored the fact that Yerkovich's expert was forced to rely upon estimations and "hearsay", however, since Universal failed to provide the actual sums, and again, to further compound the problem, the District Court refused to compel Universal to do so!

In a case involving unpaid royalties under a recording agreement, the Sixth Circuit upheld the plaintiffs' expert's estimates of royalties owed, finding that the same were proper since the defendants failed to provide actual figures. *Thomas*, 939 F.2d at 400-401. The Sixth Circuit concluded by finding that: "'The party who has caused the loss cannot insist on theoretical perfection.'" *Id.* at 402, quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 928 (2nd Cir. 1977).

A virtually analogous situation exists here. On the one hand, Universal was able to hide the actual amount of USA Network revenue regarding *Miami Vice*. On the other hand, the District Court insisted on "theoretical perfection" by refusing to consider the estimates of the same provided by Yerkovich's expert (YE 3467-3475, 2617-2620, 4102-4104). Such estimations are proper when the actual amounts are being withheld by the party with sole knowledge of the same. *Thomas*, 939 F.2d at 400-401.

Like the expert's opinion in *Thomas*, Yerkovich's expert's estimates (which showed profits due to Yerkovich (YE 3467-3475) and were based on industry standards. (YE 1966 ¶¶13-14). Universal's own expert witness conceded that these estimates were reasonable, (YE 3918:10 - 3940:13), and also testified that he had no reason to believe that the figures reported as advertising revenue for *Murder She Wrote* (a Universal series which aired on the USA Network during the same general time frame as *Miami Vice* and upon which Yerkovich's expert based his estimates) - were incorrect. (YE

3939:14 - 3940:13).

Further, Universal's witnesses admitted that they had not conducted any calculations using the USA Network receipts. (YE 3641:3-5, 3765:25 - 3767:19). In fact, although Universal's expert, Philip Cross, opined upon the correctness of Universal's profit participation statement, Universal's counsel refused to allow Mr. Cross to answer any questions regarding the interpretation of the net profits definition or whether the USA advertising revenues should have been included. (YE 3642:11 - 3669:23). This should have raised a strong adverse inference against Universal, and the District Court should have considered Yerkovich's estimates. *Thomas*, 939 F.2d at 400-402.

d. Universal Provided No Evidence to Support its Interpretation of the Contract

Contrary to the evidence presented by Yerkovich regarding his interpretation of the net profits definition, Universal provided NO evidence to support its interpretation. Universal merely made **arguments** - with no support - in its Reply. Universal made arguments as to the relationship between the USA Network, Universal, and Paramount based upon documents which Universal refused to provide to Yerkovich and which the District Court failed to order Universal to produce, namely the agreements between Universal and Paramount with regard to the USA Network. (YE 2335:7-16). Despite the lack of any evidence whatsoever and the fact that the District Court refused to compel Universal to produce documents reflecting the nature of the relationship between Universal and Paramount, the District Court blindly accepted the unsupported statements made in Universal's papers and made findings as to the nature of the relationship between these companies. (YE 2618:3-7).

Additionally, in the net profits definition at issue herein, it is provided that the gross receipts of the "Producer Company"

are the gross receipts of Universal. It does not make any allowances for pro-rationing according to ownership. (YE 1686 ¶A(b)(4)). Also, it is possible that even if Universal and Paramount were 50/50 owners of the USA Network, the revenues may have been divided in other ways. Thus, the District Court's findings that Universal was only entitled to half the revenues are similarly not based on any evidence whatsoever. The District Court's findings in this regard appear to be based on nothing but Universal's unsupported statements.

Although as shown below, the District Court refused to compel Universal to produce a witness who could testify as to the relationship between Universal and Paramount with regard to *Miami Vice*, the former head of Universal's legal department testified that he did not know the exact nature of this relationship. (YE 3973:18-3974:4, 3976:11-3977:18). Since Universal's former in-house counsel did not know the specifics of the relationship between these entities, the District Court certainly erred by opining on the same and, on top of that, refusing to compel Universal to provide any evidence thereof. A clearer case for a reversal can hardly be imagined

2. The District Court Erred in Failing to Compel Universal to Produce Documents and Other Information

Generally, a denial of a Motion to Compel discovery is reviewed for abuse of discretion. *Herring*, 894 F.2d at 1021. However, as indicated recently by the D.C. Circuit, where a district court provides no rationale for its decision but simply denies the motion with a blanket statement, the D.C. Circuit refused to give the district court's order any deference. *In re Sealed Case*, 121 F.3d 729, 740(D.C. Cir. 1997).

Similarly, in this action, neither the Magistrate Judge nor the District Court Judge provided any factual or legal reasoning behind their denial of Yerkovich's Motions to Compel Universal to produce the documents and information he was seeking. (YE 2390-2393, 2869-2870, 2895-2896). Thus, this Court should

not give those rulings any deference at all.

Specifically, Yerkovich was seeking, among many other things as shown in his Motions to Compel, documents and information pertaining to, *inter alia*: 1) the revenues received by the USA Network regarding Miami Vice; and 2) the relationship between Universal, Paramount and the USA Network (YE 1499:2 - 1500:8, 1845:21 - 1846:28, 1874:7 - 1875:3, YE 1909:7 - 1910:7, YE 2399:23 - 2404:21, and 2664:8 - 2667:18). It is also very interesting to note that the parties were disputing the interpretation of the definition of net profits. In other words, if Yerkovich's definition prevailed, he was entitled to these documents. Since the District Court adopted Yerkovich's position, its failure to order Universal to produce the documents remains a mystery.

As explained above, the District Court granted Universal's Motion for Summary Judgment based upon the fact that Yerkovich did not have this evidence - evidence that was the subject of Yerkovich's Motions to Compel.

This situation is so bizarre that Yerkovich has not even been able to find any published cases where the trial court granted a summary judgment based on the lack of the very evidence to which that the trial court refused to allow the party opposing the motion to have access. Yerkovich cannot even begin to fathom why the District Court failed to compel the production of this evidence in this case, but clearly, this Court should not give any deference to the District Court's rulings with regard to the discovery motions, and the same should be reversed.

3. A Question of Fact Existed as to Whether Universal Was Allowed to Self-Deal - Thus Summary Judgment Was Improper

In its Order granting Universal's Motion for Summary Judgment, the District Court did not address Yerkovich's self-dealing claims at all, so Yerkovich does not know the District

Court's rationale in this regard. Yerkovich presented unrefuted evidence, however, that Universal did not even make a good faith attempt to sell the series in the open market. (YE 1962-1966 ¶¶2-11, 1969-1970, 3984:16-4005:10, 4006:8-4009:25, 4010:20 - 4012:22, CONF-YE 2-66).[13]

The evidence also indicated that the Agreement could not have contemplated that Universal would sell the series to one of its own cable networks at a reduced rate since this was not the manner in which the industry operated at that time. (YE 1962-1967), YE 4013:2-4014:5). Thus, it was certainly not within Yerkovich's expectation when he entered into the agreement with Universal in 1983 that the series would be sold to Universal's own cable network at a reduced rate. (YE 4039:23 - 4040:13).

Further, as already seen, although the majority of the evidence was withheld from Yerkovich (since the Court refused to grant Yerkovich's Motions to Compel the same, at least one witness testified regarding an overall relationship between USA and Universal in which it appeared that Universal was able to hide certain revenues by producing made-for-tv movies at a premium rate while apparently selling other programs, such as *Miami Vice* at discount rates. (YE 3727:6 - 3734:9).

Universal presented NO evidence on this subject whatsoever. Universal merely argued that its conduct was permitted under an exculpatory provision of the net profits definition. However, as discussed in more detail below, conduct which violates the covenant of good faith and fair dealing, even if expressly permitted by the contract, constitutes a breach of the contract. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1394 fn. 16, 272 Cal.Rptr. 387 (1990). Thus, even if Universal was allowed to exercise

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[13] YE-CONF refers to documents which were originally filed under seal pursuant to a protective order.

absolute discretion, it was bound to exercise such discretion in good faith. Selling the series to itself at a reduced rate was not an act of good faith.

Additionally, since the District Court refused to compel Universal to produce information regarding the selling price of other, comparable shows during this same time frame, Yerkovich was unable to compare *Miami Vice* to these other shows (YE 1514:9-1517:1, 2393, 2869-2870).[14] Universal's own expert testified that comparisons with other programs was a very helpful way to determine a price for a particular program, and he himself compared *Miami Vice* to *Magnum, P.I.* (YE 3920:19-3921:22). As stated above, an adverse inference should have been drawn against Universal for its failure to produce evidence on this subject. *Thomas*, 939 F.2d at 400-402.

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[14]Yerkovich was only able to obtain information regarding one comparable program *Simon & Simon*, which was sold at a substantially higher price just one year prior to *Miami Vice*. (YE 3476-3495).

No. 98-55660

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY YERKOVICH and BUFFALO PRODUCTIONS, INC.
PLAINTIFFS/APPELLANTS

v.

MCA INC. and UNIVERSAL CITY STUDIOS, INC.
DEFENDANTS/APPELLEES

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE AUDREY B. COLLINS, JUDGE
CIV. NO. 94-3927 ABC (AJWX)

APPELLANTS' REPLY BRIEF

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I.
INTRODUCTION

Rather than address the issues presented by Yerkovich, Universal spends the majority of its brief rewriting history, making irrelevant and unsupported arguments to attempt to divert this Court's attention away from the crux of Yerkovich's arguments. Universal has not, and cannot, make a meaningful argument in opposition to one of the main issues in Yerkovich's appeal - namely, that the District Court erred by granting summary judgment on Yerkovich's breach of contract claim. In fact, Universal's argument in this regard is tucked away toward the end of Universal's brief. Apparently, Universal believes that by downplaying the District Court's glaring error, the error can be ignored.

The rest of Universal's brief is similarly weak and fails to adequately counter Yerkovich's arguments. The District Court's decisions must be reversed. To do anything less would be a miscarriage of justice.

II.
ARGUMENT

A. The District Court Erred By Granting Universal's Motion for Summary Judgment on Yerkovich's Claim Breach of Contract

This Court must review the district court's grant of Universal's Motion for Summary Judgment *de novo*. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). The standard of review is not, as Universal suggests, abuse of discretion.

Universal has also not challenged Yerkovich's interpretation of the "Net Profits" definition in this appeal. The same must be accepted as true herein.

1. Universal Does Not Dispute The Bulk of

Yerkovich's Argument

The following are either explicitly conceded by Universal or are beyond peradventure:

1. Universal had a duty to account to Yerkovich for the "Net Profits" generated by *Miami Vice*. (Universal's Brief pp. 8, 44; YE1678 ¶5(D)(1);1550-1575; 1609-1616).

2. The first number in the equation used to calculate "Net Profits" is "Gross Receipts". (YE1686 ¶A(a); 1563:5-13; 1609-1616).

3. Pursuant to the "Net Profits" definition, ***which was drafted by Universal,*** the "Gross Receipts" of a "Producer Company" who "distributes" the television series are deemed to be Universal's "Gross Receipts" and must be included when calculating "Net Profits". (YE1686 ¶A(b)(4); 1916-1948).

4. The "Net Profits" definition was "extremely broad" and vague, capable of more than one interpretation. (YE-RT99-147;YE1871-1876; 1908-1911; 1916-1948; 2394-2406; 2661-2674; 2807-2816; 2897-2938; 4047-4064).

5. Although unclear until the time the District Court entered Judgment, the District Court eventually adopted Yerkovich's interpretation that USA Network is a "Producer Company" which "distributes" the series. (YE4101:23-25).

6. Thus, USA Network's gross receipts should have been included in Universal's calculation of "Net Profits" (YE1686 ¶A(b)(4)).

7. Universal did not include USA Network's gross receipts in its calculation of "Net Profits". (YE3641:3-5; 3638-3671; 3765:25-3767:19; 3741-3773; 1609-1619; 1483-1518; 1843-1846; 1871-1877; 2394-2405; 2661-2674; 2807-2816).

8. Universal failed to produce any evidence of USA Network's gross receipts relating to *Miami Vice*, failed to do its own calculations including these gross receipts, and the District Court denied Yerkovich access to this information. (YE3641:3-5;3765:25-3767:19; 1609-1619; 1483-1518; 1843-1846; 1871-

1877; 2394-2405; 2661-2674; 2807-2816; 2392-2393; 2869-2870).

9. Universal's accounting was therefore incorrect and incomplete.

Thus, Universal's Motion for Summary Judgment, which was based solely on the alleged correctness of its accounting, should have been denied, the District Court should have ordered Universal to provide an accounting of USA Network gross receipts regarding *Miami Vice*, and should have granted Yerkovich's request under Fed.R.Civ.P. 56(f) for additional time to gather such information. The District Court's failure to do so mandates reversal of its decision.

This Court should also consider the following facts, most, if not all, of which are undisputed:

10. Although the action was filed in 1994, it was not "at issue" until12/23/96 due solely to Universal's countless motions and requests for stay. (YE30-78; 83-131;147-330; 374-781; 786-808; 809-820).

11. Even before the case was "at issue", on 12/9/96, Yerkovich propounded discovery requests which, the parties agreed, covered USA Network's "gross receipts." (YE1483-1518; 1908-1911; 2661-2674; 3017-3019; YE-RT99-147).

12. As a result of Universal's many motions and requests for stays, it was not until 4/14/97 that the District Court made it clear that all stays were lifted. (YE-RT95:16-96:9).

13. Then, and to continue to prevent Yerkovich from obtaining discovery, Universal argued that Yerkovich had agreed to forego discovery, forcing Yerkovich, on 5/8/97, to file a Motion to Compel, which was granted in part on 6/6/97 and required Universal to respond to discovery. (YE1315-1476, 1477-1478).

14. Universal continued to thwart Yerkovich's efforts to obtain discovery - serving mostly objections to the

outstanding discovery requests on 6/23/97 (six months after the same had been propounded) (YE3081-3157), not producing a single document in response to any discovery requests until 7/2/97 (just over two months prior to the time Universal filed a Motion for Summary Judgment) (YE2944¶20), and even then, producing mainly computer generated summaries with no backup, and conspicuously not producing any documents or information regarding USA Network or USA Network's gross receipts. (YE1975¶3).

15. Universal's paltry production of documents resulted in a series of "meet and confers", culminating in Yerkovich's timely filing of Motions to Compel, seeking, among other things, USA Network's gross receipts. (YE3179-3181; 3192-3193; 3251-3252; 1479-1548; 1843-1850; 2394-2602; 2661-2674; 2807; 2816; 2675-2806; 2871-2894).

16. At the 9/22/97 hearing on the Motion to Compel, the Magistrate, despite being presented with two differing interpretations of the "Net Profits definition, and although he found the language of the same to be "very broad", adopted Universal's interpretation, thus exceeding the scope of his jurisdiction by granting a "de facto" and unnoticed Motion for Summary Judgment during a ministerial discovery proceeding, denying Yerkovich the due process of presenting the differing interpretations to a competent jury for determination as to which interpretation was accurate, and simultaneously depriving Yerkovich of evidence related thereto. (YE-RT99-147; YE2392-2393).

17. On 10/3/97, Yerkovich filed an appeal of the Magistrate's denial of his Motion to Compel pursuant to 28 U.S.C. § 636. (YE2394-2602).

18. On 10/6/97 (a mere three months after Universal's first production of any documents), the District Court granted Universal's Motion for Summary Judgment, claiming that Yerkovich had not submitted admissible evidence

regarding USA Network, but ignoring the fact that the very evidence the District Court found lacking was being withheld from Yerkovich by Universal and also ignoring the fact that Yerkovich had already moved to compel that very evidence and that there was currently pending before the District Court a Motion for Reconsideration of the Magistrate's denial of that Motion. (YE2603-2624; 2394-2602; 1979-1985).

19. It was also apparent at the hearing on the Summary Judgment motion that the District Court was confused and did not understand the difference between the monies Universal received FROM USA Network (for which Universal had accounted) and the monies received BY USA Network (for which Universal had NOT accounted). (YE-RT172:20-180:24).

20. The District Court nonetheless granted the Motion for Summary Judgment, despite Yerkovich's request that the District Court delay ruling on the Motion and order Universal to produce the documents and information regarding, among other things, the gross receipts of USA Network, by way of the pending 636 appeal and the 56(f). (YE-RT183:11-205:5).

21. Later, the District Court affirmed the Magistrate's denial of Yerkovich's Motion to Compel. (YE 2869-2870). In so doing, the District Court implicitly accepted the Magistrate's improper analysis of the agreement between the parties (which he clearly did not have jurisdiction to do).

22. Finally, and in what appears to be a complete turn around from the District Court's findings on the Motion for Summary Judgment, the District Court eventually accepted Yerkovich's interpretation of the "Net Profits" definition, even though she had also affirmed the Magistrate's decision wherein he adopted a contrary position in denying Yerkovich access to the information regarding USA Network, but still continued to fault Yerkovich for not having this information. (YE 4098-4110).

These facts alone are more than sufficient for this Court to reverse the district court's grant of the summary judgment.

2. Universal's Arguments Are Either Inaccurate or Irrelevant

a. Universal's Focus on "Production Costs" Is Meaningless

Universal virtually ignores Yerkovich's arguments regarding USA Network gross receipts and instead focuses on "production costs". Universal either misses the point, or, more likely, is deliberately attempting to mislead the Court. Whether or not Universal's reported production costs were correct is irrelevant for purposes of this appeal.

It is undisputed that Universal's accounting statement was inaccurate as it did not reflect the total amount of gross receipts. Universal failed to demonstrate that even if USA Network's gross receipts were included in the calculation there would be no net profit, and Universal never provided any hint of what USA Network's gross receipts were. Under these circumstances, the District Court should have denied Universal's Motion and ordered Universal to produce the documents and other information to demonstrate the gross receipts of USA Network before it engaged in any analysis of the production costs or any other monies to be deducted from such gross receipts.

1) Under At Least One of Yerkovich's Calculations, Even Accepting Universal's Production Costs as Accurate, a "Net Profit" is Shown

Since Universal failed to produce information regarding the gross receipts of USA Network, Yerkovich was forced estimate the same based upon comparative information. One of those estimates showed that, even if all of Universal's other numbers were accepted, a substantial "net profit" would be due to Yerkovich. (YE3467-3468). Thus, Universal's argument in

this regard is disingenuous.

2) Universal Failed to Produce Documents to Back Up Its Summary Of Alleged "Production Costs"

The record shows that Universal has not provided the back up documentation regarding "production costs". Universal indicated that it would produce these documents, but then refused to produce the same to Yerkovich's expert once he went to Universal to inspect the same. (YE 1975¶¶3-7; 2349-2352; 1628-1630; 1634-1635). By this time, it was past the deadline for making Motions to Compel, and the District Court denied Yerkovich's request for this discovery under Fed.R.Civ.P. 56(f). Although the District Court indicated that she was not going to decide who was to blame for the discovery problems (YE-RT109:6-25), in contravention of the law requiring all inferences to be drawn in Yerkovich's favor as the non-moving party, the District Court, once again, blindly sided with Universal.

An adverse inference should have been made against Universal based on these withheld documents. *Thomas v. Gusto Records, Inc.*, 939 F.2d 395, 401-402 (6th Cir. 1991), *cert. den.* 502 U.S. 984, 112 S.Ct. 591, 116 L.Ed.2d 616 (1991). This should be especially true in the case of a summary judgment motion where all inferences are to be drawn in favor Yerkovich as the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986); see also, Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions*, §72.16.

3. Yerkovich Has Not Waived Any Arguments Regarding the District Court's Error in Failing to Consider Yerkovich's Expert's Opinion

Yerkovich is baffled at Universal's argument that Yerkovich somehow waived his right to challenge the district

court's failure to consider Yerkovich's expert's analysis. This issue is addressed extensively in Yerkovich's brief (pp. 29-31).

4. The District Court Erred By Failing to Consider Yerkovich's Expert's Opinion

Universal's argument is a typical "Catch-22". On the one hand, it argues that the District Court properly denied Yerkovich access to the information regarding USA Network's gross receipts. On the other hand, Universal argues that the District Court properly refused to consider Yerkovich's expert's estimates because the expert did not have the very information being withheld, i.e. USA Network's gross receipts regarding *Miami Vice*.

The *Thomas* court saw through this type of gamesmanship when it held that an expert witness may properly rely upon estimates when the information as to the exact figures is being withheld. Universal does not even make a good faith argument to attempt to distinguish the *Thomas* case.

Universal also does not dispute that Yerkovich's expert's estimates (like those of the expert in the *Thomas* case) were based on industry standards (YE3467-3475). Similarly, Universal does not dispute that Universal's own expert witness conceded that the estimates of Yerkovich's expert were reasonable, and he had no reason to believe that they were incorrect (YE3918:10-3940:13).

Finally, estimates based on USA Network gross receipts generated by a similar series are proper when the actual information is being withheld. The Magistrate even acknowledged that, under certain circumstances, comparative information regarding other programs is relevant. (YE-RT119:7-25).

5. Yerkovich Diligently Pursued Discovery

a. Universal Delayed and Thwarted Discovery

The hypocrisy in Universal's argument that Yerkovich

is somehow to blame for lack of discovery is astounding. The record shows that Universal used every game imaginable to suppress evidence and keep from fulfilling its discovery obligations.

Yerkovich's diligence is shown by his Motions to Compel and Motions for Reconsideration of the denials of the same under 28 U.S.C. § 636. (YE1315-1476; 1479-1521; 1779-1911; 2394-2602; 2630-2657; 2661-2868; 2871-2894).

In addition to those Motions, and the stays and Universal's discovery games discussed above at pp. 3-8, the Court should consider:

- Universal refused to participate in the Local Rule 6 Early Meeting of Counsel which mandated early disclosures and discussions. (YE1265-1277).
- Universal did not provide Yerkovich with an accounting statement until 5/6/97 - three years after the case had been filed and only four months prior to the filing of Universal's Motion for Summary Judgment. (YE3078; 2943 ¶18).
- Universal refused to identify witnesses until early September, 1997. (YE3257-3268).
- Although Yerkovich requested that his expert be allowed access to Universal's books and records in June, 1997, it was not until 9/17/97 (AFTER Universal filed its Motion for Summary Judgment) that he was finally allowed to do so. (YE1975-1977; 2349-2352; 3079; 3251-3252; 3272; 3274)
- Even then, Yerkovich's expert was not provided with all the documents he had been promised, and was told that additional documents (but still not all requested documents) would not be available until 9/23/97 (AFTER Yerkovich's Opposition to the Motion for Summary Judgment was due).
- Universal waited until one business day before the scheduled deposition and the motion cutoff before serving objections to USA Network subpoena. (YE3277-3294).
- Yerkovich agreed to nearly every one of

Universal's requests for additional time, yet Universal refused to agree when Yerkovich requested the same courtesy. (YE26-29; 3015-3016; 2635:11-16).

b. Yerkovich Sought Discovery Relating to the Gross Receipts of USA Network

Universal's contends that Yerkovich did not seek discovery relating to the gross receipts of USA Network. This is blatantly false, and there is no mention of this newly concocted argument in any of Universal's papers filed in opposition to Yerkovich's motions attempting to gather this information. (YE 1483-1518; 1908-1911; 2661-2674).

Indeed, Universal explicitly acknowledged that Yerkovich was moving to compel this very information. In one of Universal's papers opposing Yerkovich's Motion to Compel, Universal merely argues that Yerkovich is not entitled to information regarding the gross receipts received by USA Network by claiming that USA Network is not a "Producer Company" and does not "distribute" *Miami Vice*. (YE 1909:7-24). Universal does not argue that Yerkovich was not seeking that information or that Yerkovich's discovery requests did not cover that information.

Similarly, at the hearing on the Motion, Universal's counsel argued only that Yerkovich was not entitled to the information, never once contending that Yerkovich had not requested it. (YE-RT99-147).

In Universal's Opposition to Yerkovich's Motion for Reconsideration of the Magistrate's denial of the Motion to Compel, Universal acknowledges:

> The discovery which is the subject of this motion falls into three general categories: (1) information regarding Universal's overall relationship with USA Network and the

> **advertising revenue received by USA Network in** connection with the exhibition of "Miami Vice".

YE 2664:10-13 (emphasis added). See also generally, YE 2664:8-2667:18.

Additionally, in the objections to the USA Network subpoena (which Universal's counsel prepared), it is recognized that Yerkovich was seeking the same information from Universal as it was from USA Network - namely, documents and information reflecting USA Network's gross receipts regarding *Miami Vice*. (YE 3277.2 - 3294).

c. Universal's Argument That It Does Not Have the Requested Information is Similarly Frivolous

Universal's argument that it does not have the requested documents or information is also frivolous. Not once in any of the papers filed by Universal in opposition to Yerkovich's efforts to obtain this information did Universal make this argument. (YE 1483-1518; 1908-1911; 2661-2674). Had Universal done so, it would have probably been a violation of Fed.R.Civ.P. 11. Likewise, the record is devoid of any statements from Universal attesting to this purported fact. Indeed, to do so would have probably constituted perjury.

This issue was not raised by Universal at all until the hearing on Yerkovich's Motion to Compel the same (when it was past the deadline for propounding discovery or filing Motions to Compel). Then, Universal's counsel merely made a brief comment to this effect, while not bound by the penalties of perjury or Rule 11. (YE-RT142:7-19).

Further illustrating the outlandish nature of Universal's argument is the fact that USA Network is a subsidiary of Universal. (Universal's Brief, p. i; YE3452-3454). Documents which are in the "possession, custody, or control" of a subsidiary

are, for discovery purposes, generally deemed to be in the "possession, custody, or control" of the parent. See, e.g., *U.S. v. International Union of Petroleum and Industrial Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989).

Because Universal never based its refusal to produce this information on this newly raised argument, and because, as shown herein, the District Court refused to order Universal to produce any information regarding the nature of the relationship between Universal and USA Network, the District Court could not have engaged in the proper analysis for making a determination of whether the documents of the subsidiary (USA Network) were in the possession, custody or control of the parent (Universal). For example, in *Uniden America Corporation v. Ericsson, Inc.*, 181 F.R.D. 302 (M.D.N.C. 1998), the court conducted a detailed analysis of the nature of the relationship between the parent and the subsidiary in determining whether documents in the possession of the subsidiary were deemed to be within the possession of the parent. *Id.* at 304. No such analysis was conducted in the proceedings below since there is not one shred of evidence in the record upon which the District Court could have done so.

Universal also failed to raise this issue a an objection to any of Yerkovich's requests. (YE3121-3157). *George Hantscho Company, Inc. v. Miehle-Goss-Dexter, Inc.*, 33 F.R.D. 332, 334 (S.D.N.Y. 1963).

Finally, Universal's counsel prepared the objections to the subpoena on USA Network's behalf. (YE3277-3294). This shows a commonality of interest between Universal and USA Network such that Universal's unsupported claim that it does not have access to these documents is frivolous and should be disregarded. See, e.g. *M.L.C., Inc. v. North American Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986).

d. Universal Should Bear the Penalty for Failing to Provide This Information

Universal drafted the agreement which places the duty upon Universal to account for all gross receipts. If Universal is unable to obtain the information necessary to properly account, Universal should bear the brunt of it. An adverse inference should have been drawn against Universal in Yerkovich' s favor since all inferences were to be drawn in support of the non-moving party. *Anderson*, 477 U.S. at 255; *Thomas*, 939 F.2d at 400-401; Devitt, Blackmar & Wolff, *Federal Jury Practice and Procedure*, §72.16.

e. The District Court Clearly Abused Its Discretion By Failing to Compel Universal To Produce Evidence

Universal argues that the District Court properly denied Yerkovich's Motions to Compel because the Motions were not directed toward "Production Costs". Universal again either misses the point or is intentionally attempting to mislead this Court.

The error occurred, as shown above, when the District Court granted summary judgment based on Yerkovich's lack of the very evidence Yerkovich was seeking to compel - namely information regarding USA Network. Whether or not Universal's "Production Costs" are correct is irrelevant at this point since Universal never accounted for its gross receipts.

The reason Yerkovich did not make a Motion to Compel the "back up" documentation regarding Production Costs was that Universal led Yerkovich to believe they would be produced (YE 1629 (no.4), 1634 (nos. 37 and 38), 1639 (no. 4; 1975-1977; 2349-2352), but when Yerkovich's expert went to Universal to inspect these documents (which Universal made sure was after the last day to file Motions to Compel), Universal's representative informed Yerkovich's expert that not all of these documents were going to be produced and even then the documents which would be produced would not be available until September 23, 1998 (which was AFTER Yerkovich'

Opposition to the Motion for Summary Judgment was due). (YE1975-1977; 2349-2352).

The District Court further erred by failing to grant Yerkovich's request for additional time to obtain this information pursuant to Fed.R.Civ.P. 56(f), even though the District Court indicated that she was not going to make a determination as to which party was at fault for the discovery problems. (YE-RT169:6-25).

f. Even Absent Specific Discovery Requests, Universal Had a Duty to Provide this Information

Universal had a duty to provide this information to even absent specific discovery requests. See, e.g. Fed.R.Civ.P. 26, Advisory Committee Notes, 1993 Amendments, Subdivision (a). As stated therein:

> The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Id.

Universal's hyper technical arguments are certainly the types of gamesmanship which the amendments to Rule 26 were intended to address.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY YERKOVICH, an individual; and BUFFALO PRODUCTIONS, INC., a California corporation, Plaintiffs, vs. MCA INC., a corporation; UNIVERSAL CITY STUDIOS, INC., a Delaware corporation dba UNIVERSAL TELEVISION; WRITERS GUILD OF AMERICA west, INC., and DOES 2-100, inclusive, Defendants.	CASE NO: 94 3927 ABC (AJWx) UNIVERSAL'S SUPPLEMENTAL MEMORANDUM RE DISCOVERY MOTIONS TO BE HEARD ON SEPTEMBER 22, 1997 Date:September 22, 1997 Time:10:00 a.m. Place:Mag. Judge Wistrich Discovery Cut-off: October 3, 1997 Motion Cut-off: October 6, 1997 Trial Date: November 4, 1997

Defendants Universal Studios, Inc. (formerly MCA Inc.) and Universal City Studios, for itself and its division Universal Television (collectively, "Universal"), hereby submits its Supplemental Memorandum in support of the discovery motions to be heard on September 22, 1997.

SUPPLEMENTAL MEMORANDUM

The vast majority of the issues raised by plaintiffs Anthony Yerkovich and Buffalo Productions, Inc. (collectively, "Yerkovich") have already been addressed by Universal in its portion of the joint stipulations filed with the Court on September 3, 1997. However, there are a few contentions made and arguments raised by Yerkovich which Universal believes should be dispelled.

I. USA Network is Not a "Producer Company" and its Revenues are Not Part of "Gross Receipts."

In his portion of the joint stipulations, Yerkovich has chosen to completely ignore the plain language of Paragraph D of Exhibit B to the Agreement, which provides that Universal is not subject to liability based upon the manner in which it exploits "Miami Vice. Rather, in a number of instances, Yerkovich claims that he is entitled to information, documents and deposition testimony regarding USA Network because USA Network should be considered a "Producer Company" pursuant to the Agreement, and that the gross receipts of USA Network should thus be considered as part of "Gross Receipts" under the "net profit" definition. This is ridiculous.

For a variety of reasons not addressed herein, USA Network is not a Producer Company as defined in Exhibit B to the Agreement. However, even if it were, the only monies relevant to this case would be its "Gross Receipts," which are limited to the monies received "as consideration for the right to exhibit ["Miami Vice"]." (Exhibit B to Agreement, ¶ A(b)). USA Network did not receive monies for the right to exhibit. It paid monies for the right to exhibit. Yerkovich does not dispute

that these monies were paid to Universal and were reported to Yerkovich in the profit participation statement. Accordingly, this is not a basis for permitting discovery regarding this issue.

Moreover, in pleadings filed with both Judge Collins and the Magistrate on September 15, 1997, Yerkovich now claims that Exhibit B is not even part of Yerkovich's agreement with Universal because it allegedly was not attached to the Agreement when it was signed by Yerkovich. (See Exhibits "A" and "B" to Abrams Decl., filed concurrently herewith). After almost three years of litigation, and after both of the parties relying upon provisions of Exhibit B in support of and in opposition to various motions, Yerkovich only now claims, for the first time, that Exhibit B is not part of the Agreement. Yerkovich cannot have it both ways. If Exhibit B was not part of the Agreement, then Yerkovich cannot rely on the definition of "Producer Company" therein.

II. Universal's Other Contracts for "Miami Vice" Have No Bearing on the Calculation of "Net Profits."

With regard to Deposition Category No.8, Yerkovich contends that testimony regarding other contracts will demonstrate "whether Universal calculated net profits consistently for other net profit agreements for the *Miami Vice* series." In no sense will deposition testimony reveal such information. "Net profits" are calculated based upon the particular definition which is part of that person's contract. Therefore, if another profit participant has a "net profit" definition different from Yerkovich's definition, then Universal would not necessarily calculate "net profits" in the same manner.

Moreover, Yerkovich now contends that Exhibit B is not part of his Agreement. Therefore, the Universal "net profit" defmition attached to other agreements would be entirely irrelevant. However, even if Exhibit B is part of the Agreement -- and it is --comparing Universal's application of that definition with other agreements containing the same definition is only

relevant to the extent Yerkovich claims that he was treated less favorably by Universal. Yerkovich has never made such a claim. Moreover, testimony regarding the contracts themselves will have no bearing upon the actual interpretation and enforcement of those contracts. Accordingly, testimony regarding other contracts regarding "Miami Vice" will be of no probative value.

III. Universal Will Provide Deposition Testimony and Make Documents Available Regarding Its Standard Rates.

With regard to Document Request Nos. 34 and 35, Yerkovich has claimed that he needs other profit participation agreements and statements issued pursuant thereto to establish whether Universal charged its "standard rates" for certaln production cost items, as set forth in Paragraph A(f) of Exhibit B. As discussed in Universal's response, the documents requested by Yerkovich will not reveal this information. Nevertheless, Universal will be producing a deposition witness (William DeCinces) and making documents available to Yerkovich's conuultant, William Adelmann, with regard to the issue of Universal's standard rate charges which were used during the production of "Miami Vice."

Based upon the arguments set forth herein, and in the joint stipulations previously filed with the Court, Universal respectfully requests that its Motions for Protective Orders be granted and that Yerkovich's Motions to Compel be denied.

Dated: September 16, 1997

GAIL MIGDAL TITLE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY YERKOVICH, an individual; and BUFFALO PRODUCTIONS, INC., a California corporation, Plaintiffs, vs. MCA INC., a corporation; UNIVERSAL CITY STUDIOS, INC., a Delaware corporation dba UNIVERSAL TELEVISION; WRITERS GUILD OF AMERICA west, INC., and DOES 2-100, inclusive, Defendants.	CASE NO: 94 3927 ABC (AJWx) UNIVERSAL'S OPPN TO PLAINTIFF'S MOTION FOR RECON. OF MAGISTRATE'S DECISION; DECL. OF STEVE COCHRAN AND EXHIBITS IN SUPPORT THEREOF Hon. Audrey B. Collins Discovery Cut-off: October 3, 1997 Motion Cut-off: October 6, 1997 Trial Date: None

I. INTRODUCTION

Yerkovich has failed to demonstrate, as he must, that Magistrate Judge Wistrich's September 30, 1997 and September 29, 1997 Orders denying Yerkovich's motions to compel (collectively, the "Orders") are clearly erroneous or an abuse of discretion. As such, this Court should affirm the Orders and deny Yerkovich's Motion for Reconsideration.

II. YERKOVICH HAS FAILED TO MEET HIS HEAVY BURDEN OF ESTABLISHING THAT MAGISTRATE JUDGE WISTRICH'S ORDERS ARE CLEARLY ERRONEOUS AND THAT HE HAS ABUSED HIS DISCRETION.

A party seeking to overturn a magistrate's discovery ruling "bear[s] a heavy burden." Citibank v. Interbank Card Association, 87 F.R.D. 43, 46 (S.D.N.Y. 1980); Com-Tech Assocs. v. Computer Assocs. Int'l. Inc., 753 F.Supp. 1078, 1099 (E.D.N.Y. 1990). "The district court shall defer to the magistrate's orders unless they are clearly erroneous or contrary to law." Grimes v. City and County of San Francisco, 951 F.2d 236, 240 (9th Cir. 1991); U.S.C. section 636(b)(1)(A). "Neither the language of section 636(b)(1)(A) nor its legislative history allocates to the district court the authority to do more than perform a clearly erroneous review of a magistrate judge's order on a nondispositive, pretrial matter." Blinzler V. Marriott International. Inc., 857 F.Supp. 1, 2 (D.R.I. 1994), citing Haines v. Liggett Group. Inc., 975 F.2d 81, 91 (3d. Cir. 1992) and H.R.Rep. No.94-1609, 94th Cong., 2d Sess. 8-9 (1976).

A "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), cited in Commodity Futures Trading Commission v. Standard Forex. Inc., 882 F.Supp. 40, 42 (E.D.N.Y. 1995).

Thus, a district court "must affirm the magistrate judge unless 'it is left with the definite and firm conviction that a mistake has been committed.'" Sana v. Hawaiian Cruises, Ltd, 961 F.Supp. 236, 238 (D. Hawai'i 1997), citing Burdick v. Commissioner, 979 F.2d 1369, 1370 (9th Cir. 1992).

Yerkovich has failed to meet this stringent standard. There is a sound basis for the decision reached by the Magistrate in denying Yerkovich's motions to compel. Yerkovich has failed to present any evidence or argument to demonstrate that a mistake has been committed.

During the hearing of Yerkovich's motions to compel held on September 22, 1997, the Magistrate heard extensive argument and concluded that the balancing of the equities in this case weighed in favor of denying the discovery sought by Yerkovich. The Magistrate noted that "there is a proportionality principle in Rule 26 and . . . there is a point at which relevance gets so attenuated based on the contract language or other aspects of the case that it's pointless." (Hearing Transcript, p.26:13-16, attached hereto as Exhibit "A"). While Yerkovich may contest the outcome of this balancing approach, he has failed to demonstrate, as he must, that the Magistrate abused the discretion with which he is vested with regard to resolving discovery disputes.

Moreover, the Magistrate had ample opportunity to consider Yerkovich's Motions. In fact, Yerkovich had four separate opportunities to convince the Magistrate that he was entitled to the discovery sought -- the joint stipulation filed on September 3, his supplemental memorandum filed dn September 16, the hearing on September 22 and his opposition to Universal's Motion for Summary Judgment, a courtesy copy of which was requested by and provided to the Magistrate. After consideration of all of this written material, as well as the oral argument of Yerkovich's counsel, the Magistrate determined, after taking these motions under submission for over a week,

that Yerkovich was not entitled to the discovery which is the subject of this motion. Yerkovich has failed to present any evidence that the Magistrate abused his discretion or acted in a clearly erroneous manner.

Finally, in reviewing the Magistrate's Orders, the Court "may not simply substitute its judgment for that of the deciding court." Grimes, 951 F.2d at 241. As the district court noted in Citibank, "[t]his is not to say that the Court, if confronted with the dispute in the first instance, would have chosen to draw the line in the same place. But since the Court believes that the Magistrate's decision to be well within the bounds of discretion, it will not reconsider it at this time." Citibank, at 48. This reasoning is directly on point and disposes of Yerkovich's Motion.

The Magistrates Act is not intended to allow a party two opportunities to have its motion heard and ruled upon. Rather, it is intended solely to provide oversight by the district court to ensure that a magistrate has not abused his discretion and that his order is not clearly erroneous. Based upon the record before the Court, it is even not a close question as to whether the Court should affirm the Orders of Magistrate Wistrich.

III. MAGISTRATE JUDGE WISTRICH'S ORDERS ARE NEITHER CLEARLY ERRONEOUS NOR CONTRARY TO LAW

The discovery which is the subject of this motion falls into three general categories: (1) information regarding Universal's overall relationship with USA Network and the advertising revenue received by USA Network in connection with the exhibition of "Miami Vice"; (2) standard forms used by Universal between 1980 and 1990; and (3) Universal's efforts to exploit "Miami Vice."

A. USA Network's Advertising Revenue is Not, Under Any Reasonable Interpretation of Exhibit B, Part of "Gross Receipts".

In his Motion for Reconsideration, Yerkovich simply reargues that he is entitled to the discovery which was the subject of the Magistrate's Orders because he believes that the USA Network is a "Producer Company" pursuant to the "net profit" definition set forth in Exhibit B to the Agreement.[15] Based upon his contorted interpretation of Exhibit B, Yerkovich claims that he is entitled to a vast array of information regarding the advertising revenues of USA Network and the overall relationship between Universal and the USA Network.

The issue as to whether or not USA Network is a "Producer Company" is relevant only to the extent that it affects "Gross Receipts" as defined in Exhibit B. "Gross Receipts" are defined as "the total of all monies actually received by Producer as consideration for the right to exhibit the Photoplays." Exhibit B, ¶ A(b). Thus, the only monies which are considered as part of "Gross Receipts" are monies which are received for the right to exhibit "Miami Vice."

An "Exhibitor" is defined in Exhibit B as "anyone who has acquired from Producer or its licensee the right to televise or to sponsor exhibitions of the Photoplays." Exhibit B, ¶ A(h). In this case, Universal Television was the Producer. This is expressly stated in Exhibit B and is undisputed. Universal Television then licensed "Miami Vice" to MCA Television Limited. As the licensee, MCA Television Limited then entered into the License Agreement with USA Network. (See Exhibit "J" to Yerkovich's Motion). Thus, despite Yerkovich's reliance upon the patently objectionable declarations of Anthony

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[15] For the convenience of the Court, a copy of the "net profit" definition attached as Exhibit B to the Agreement is attached hereto as Exhibit "B."

Yerkovich, Joseph Abruscato and Philip DeGuere[16], and the improper reliance upon the deposition transcripts of Robert Bradley and Charles Larsen[17], it is clear that USA Network is an Exhibitor pursuant to the definition set forth in Exhibit B.[18] Thus, the money received from USA Network pursuant to the License Agreement for the right to exhibit "Miami Vice," and only this money, is considered part of "Gross Receipts."

Yerkovich essentially argues that the definition of the term "Producer Company" in Exhibit B, in and of itself, establishes his right to obtain the discovery he so desperately seeks. However, Exhibit B further provides that a "Producer Company may act as distributor of the Photoplays, and that a Producer Company may furnish facilities, materials, equipment and personnel for the Photoplays." Exhibit B, ¶ A(C). Thus, Exhibit B contemplates that if a Producer Company is involved

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[16] Universal has previously filed evidentiary objections to each of these declarations in connection with Universal's Motion for Summary Judgment.

[17] New evidence may not be submitted to the district court in connection with a motion for reconsideration. "[T]he district court is not permitted to receive further evidence; it is bound by the clearly erroneous rule in reviewing questions of fact." Haines, 975 F.2d at 91. This is an elemental principle of common law review; "common law tradition [does not] permit a reviewing court to consider evidence which was not before the tribunal of first instance." Haines, 975 F.2d at 92. Thus, the deposition excerpts of Robert Bradley and Charles Larsen, and MCA's Form 10-K (Exhibit "I"), submitted by Yerkovich in support of his Motion for Reconsideration, none of which were part of the record before the Magistrate, may not be considered by the Court in determining whether the Magistrate's decision should be affirmed.

[18] Yerkovich's contention that an "Exhibitor" is the person who turns on the television set in his or her home defies common sense and is nothing short of ludicrous.

in either the production or the distribution, as opposed to the exhibition, of "Miami Vice," the calculation of "net profits" pursuant to Exhibit B may be affected. It is indisputable that USA Network was not involved in the production of "Miami Vice." As the Magistrate noted, "I guess one thing that I'm struggling with about your argument . . . is how something qualifies as a producer company without having had anything to do with the production." (Hearing Transcript, p. 29:21 - 30:1)

Similarly; USA Network did not distribute "Miami Vice," as that term is used in Exhibit B.[19] As Yerkovich is eager

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[19] Yerkovich's contention that USA Network is a "distributor" is based upon inadmissible declarations, improper evidence and new legal arguments not presented before the Magistrate. As previously stated, Universal filed evidentiary objections to the Yerkovich, Abruscato and DeGuere declarations in connection with its Motion for Summary Judgment. Similarly, any reliance upon the declarations of Robert Bradley or Charles Larsen is impermissible, since, as discussed above, these declarations were not submitted to the Magistrate.

Yerkovich's citation to Congressional findings regarding cable networks is also impermissible as this Motion is the first time that such an argument has been raised. As Judge Kozinski has noted:

> [A]llowing parties to fully litigate their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrate Act. We do not believe that the Magistrates Act was intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court

Greenhow v Secty. of Health & Human Services, 863 F.2d 633, 638 (9th Cir. 1988).

This is exactly the strategy which Yerkovich has employed throughout this litigation. However, just as the Court has rejected Yerkovich's last-minute attempt to disavow Exhibit B, so too should the Court ignore Yerkovich's new arguments.

Finally, Yerkovich's reliance upon the nomenclature used in the

to point out, Exhibit B provides that "[i]f the Photoplays are distributed by a Producer Company, gross receipts of that Producer Company shall be deemed gross receipts of Producer." Exhibit B, ¶ A(b)(4). These provisions, however, address instances where a Producer Company, such as MCA Television Limited, licenses a television series from Universal Television (the Producer) and then distributes it to a third party exhibitor such as USA Network. By providing that the gross receipts received by MCA Television Limited shall be deemed the gross receipts of Universal Television, Universal is prevented from taking a distribution fee on the monies received from MCA Television Limited. In other words, this provision ensures that only the monies directly received by MCA Television Limited will be treated as gross receipts, and that the license fee will be subject to only one distribution fee.

Yerkovich contends that he will be prejudiced if he is unable to obtain the discovery which is the subject of this Motion for Reconsideration. However, as the Court has already found in granting Universal's Motion for Summary Judgment, Yerkovich must establish that Universal has committed accounting errors of over $200,000,000 million for Yerkovich to be owed any money. As a result, it is Universal who is more likely to be prejudiced if Yerkovich's Motion for Reconsideration is granted, as Universal will be forced to

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USA/Universal License Agreement to establish that USA Network is a "distributor" is unavailing. In determining whether USA Network's advertising revenue should be considered part of "Gross Receipts," it is irrelevant whether USA Network may be labeled as a "distributor" in another agreement. Likewise, it is irrelevant how the word "distribute" is defined in Webster's dictionary. Rather, the appropriate, and only, inquiry is how USA Network should be characterized for the purposes of Exhibit B. As discussed above, USA Network is clearly an "Exhibitor" and the over $45 million which it has paid to Universal for the right to exhibit "Miami Vice" has been reported to Yerkovich.

respond to overbroad discovery unlikely to lead to the discovery of any admissible evidence that impacts the Court's Order granting Universal's Motion for Summary Judgment.

B. Yerkovich has Failed to Present Any Argument as to Why the Court Should Reverse the Magistrate's Order with Regard to Universal's Standard Forms.

Yerkovich also argues that the Magistrate has erred by refusing to order Universal to produce "standard form" agreements used by Universal between 1980 and 1990. However, the evidence he relies upon (Declaration of Robert Bradley) may not, as discussed above, be relied upon by the Court as it was not part of the record considered by the Magistrate See Haines, 975 F.2d at 91.

C. Yerkovich is Not Entitled to Any Information Regarding The Manner in Which Universal Exploited "Miami Vice."

As the Court has previously noted, paragraph D of Exhibit B expressly precludes any challenge to the license fee which "Miami Vice" received from USA Network, or Universal's efforts to license "Miami Vice." Specifically, paragraph D provides:

> Nothing shall be deemed to obligate Producer to produce, distribute, exhibit or otherwise exploit the Photoplays . . . and if it elects to [do so] . . . the manner in which it does do shall not subject it to any liability to Participant.

Thus, the Magistrate's decision to deny Yerkovich's motions to compel with regard to information about the manner of exploitation is mandated by the Agreement.

IV. CONCLUSION

A magistrate is vested with significant discretion to decide discovery disputes, and absent a manifest abuse of this discretion, a district court should defer to the decision reached

by the magistrate. Magistrate Judge Wistrich's exercise of such discretion is imminently reasonable in this case and Yerkovich has failed to demonstrate to the contrary. As such, Yerkovich's Motion for Reconsideration should be denied and Magistrate Judge Wistrich's September 30, 1997 Orders should be adopted and affirmed by this Court.

Dated: October 8, 1997

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANTHONY YERKOVICH, an individual; and BUFFALO PRODUCTIONS, INC., a California corporation, Plaintiffs, vs. MCA INC., a corporation; UNIVERSAL CITY STUDIOS, INC., a Delaware corporation dba UNIVERSAL TELEVISION; WRITERS GUILD OF AMERICA west, INC., and DOES 2-100, inclusive, Defendants.	CASE NO: 94 3927 ABC (AJWx) SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER RE: DOCUMENT REQUESTS AND INTERROGATORIES Date: September 22, 1997 Time: 10:00 a.m. Ctrm: Mag. Judge Wistrich

Plaintiffs Anthony Yerkovich and Buffalo Productions, Inc. (collectively "Yerkovich") hereby submit this Supplemental Memorandum.

I. INTRODUCTION

In opposing Yerkovich's Motion to Compel, Defendants MCA Inc. and Universal City Studios, Inc. (collectively "Universal") make nothing but unsupported, illogical, and conclusory assertions. Quite plainly, however, Universal failed to provide any real reasons why it should not be compelled to respond to proper discovery.

II. UNIVERSAL SHOULD BE COMPELLED TO RESPOND

* * *

B. Document Requests Nos. 40 and 53 through 58 - Documents Regarding the USA Network

Universal argues that these documents are only relevant to evaluate the nature of Universal's exploitation of *Miami Vice*. However, Universal ignores the fact that these documents are relevant to a much more fundamental issue. Namely, under either Yerkovich's or Universal's interpretation of the agreement, "net profits" are calculated by starting with the gross revenue and then taking certain deductions. These documents are relevant - quite simply - to the gross revenue portion of the equation. Universal itself even admits that Yerkovich is entitled to discover information regarding all monies received by Universal in consideration of the right to exploit the series. See, Joint Stipulation at p. 22, lines 2-3.

It is undisputed that Universal owns at least one-half of the USA Network and that in selling *Miami Vice* to the USA Network, Universal was, in effect, selling the series to itself. In other words, Universal acted as the producer, distributor, and exhibitor of the series. Universal has only accounted to Yerkovich for the profits it received as a producer and distributor of the series. Yerkovich is entitled to discovery as to the exact nature of the relationship between Universal and the USA Network in order to ascertain whether Universal should have also accounted for certain profits it received through the

USA Network as advertising revenue, subscriber revenue, etc. For example, if the USA Network paid Universal a portion of its advertising revenue with regard to *Miami Vice*, the same should obviously be included as part of the gross revenue Universal received from the series.

Further, Robert Kelly testified at his deposition that Universal entered into an overall arrangement with the USA Network around the same time it entered into the agreement with regard to *Miami Vice*. See, Kelly Depo. P. 168. Yerkovich should be entitled to see the terms of such an agreement since the same could have resulted in certain additional monies being paid to Universal.

These documents are also relevant to the self-dealing issue addressed below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANTHONY YERKOVICH, an individual; and BUFFALO PRODUCTIONS, INC., a California corporation, Plaintiffs, vs. MCA INC., a corporation; UNIVERSAL CITY STUDIOS, INC., a Delaware corporation dba UNIVERSAL TELEVISION; WRITERS GUILD OF AMERICA west, INC., and DOES 2-100, inclusive, Defendants.	CASE NO: 94 3927 ABC (AJWx) NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF MAGISTRATE'S DECISION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (Local Magistrate Rule 3.3) Date: September 22, 1997 Time: 9:30 a.m. Ctrm: Judge Collins

[FILED SIMULTANEOUSLY WITH *EX PARTE* APPLICATION TO SHORTEN TIME FOR HEARING]

I.
INTRODUCTION

Magistrate Judge Wistrich issued Orders regarding various Motions to Compel. Magistrate Judge Wistrich's decision on certain of the issues, however, is clearly erroneous. Accordingly, Yerkovich respectfully requests reconsideration of that decision by this Court.

* * *

A. Revenues Received from USA - Document Requests Nos. 54 - 58 and Deposition Category No.16

These documents should have been ordered to be produced, and this deposition should have been ordered to be compelled, since any revenue received by the USA Network with regard to *Miami Vice* is clearly relevant and discoverable. According to Universal's characterization of the agreement between the parties, the terms of Exhibit B, purportedly attached to what has been identified in this action as Exhibit 5, are included within the contract between the parties. (Submitted herewith is a true and correct copy of Exhibit 5). Under the terms of Exhibit B, Universal must account to Yerkovich for all monies received by the USA Network. Universal has failed to do so.

Exhibit B provides that when a "Producer Company" distributes the Photoplays, the gross receipts of that "Producer Company" shall be included within Universal's gross receipts when calculating net profits. Paragraph A (b)(4) of Exhibit B provides, in relevant part:

> If the Photoplays are distributed by a Producer Company, gross receipts of that Producer Company shall be deemed gross receipts of Producer, except as otherwise herein provided.

1. The USA Network is a "Producer Company"

> "Producer Company" is defined in Exhibit B as: Producer or a company owning or controlling Producer, or owned or controlled by Producer or under common ownership or control with Producer, except any publishing subsidiary wholly or partially owned by Producer or any Producer Company.

See, ¶A(g) of Exhibit B (emphasis added).

Under this definition, the USA Network is "under common ownership" with Universal. Namely, both companies are owned, at least in part, by MCA. Any ambiguity in this regard must be resolved against Universal since Universal drafted this language. Cal.Civ.Code § 1654.

> When interpreting a contract: The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Cal.Civ.Code § 1644. Webster's Dictionary defines "common" as: "Belonging to, shared by, or applying equally: JOINT. " (See, Exhibit H submitted herewith which is a true and correct copy of the relevant page from the dictionary.) Using this ordinary definition of the word "common", the phrase "common ownership" means simply any company that Universal jointly owns with any other entity or any entity with whom Universal shares a joint owner.

Further lending support for this interpretation are Universal's Securities Exchange Commission filings wherein it characterized both Universal Television and the USA Network as "subsidiaries". (See, Exhibit I submitted herewith). In other words, Universal Television ("Producer") and the USA Network are both subsidiaries of MCA Inc. - i.e. both are under "common

ownership".

2. The USA Network is a Distributor

The gross receipts of a "Producer Company" are to be included with Universal's gross receipts when the "Producer Company" distributes the photoplays. Under this definition, the USA Network is a distributor. Therefore, the monies earned by the USA Network-are relevant to this action.

The following supports the contention that the USA Network is a distributor. First, even Congress itself refers to the cable systems as distributors. For example, in the Congressional fmdings and statement of policy of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. §§ 521, et seq.), Congress states, in relevant part:

> (a) Findings: The Congress fmds and declares the following:
>
> (2)... Without the presence of another multichannel video programming **distributor,** a cable system faces no local competition. . . .
>
> (7) There is a substantial govenmiental and First Amendment interest in ensuring that cable subscribers have access to local non-commercial educational stations which Congress has authorized, . . . The distribution of unique noncommercial, educational programming services advances that interest. . .
>
> .
>
> (9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 [47 USCS § 307(b)] of providing a fair, efficient, and equitable **distribution** of broadcast services.

. . .

(18) Cable television Systems often are the single most efficient **distribution** system for television programming. . . .

(b) Statement of policy. It is the policy of the Congress in this Act to --

(1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media.

See, Notes to 47 U.S.C. § 521 (emphasis added).

Second, in the agreement between the USA Network and Universal regarding *Miami Vice* ("the USA/Universal Agreement"), the USA Network is referred to as a distributor. Submitted herewith as Exhibit J is a true and correct copy of this agreement which was produced by Universal in this action. The last sentence of Paragraph 1(a) of the USA/Universal Agreement provides:

> Subject to existing agreements, Licensor agrees to use its diligent efforts to add additional area(s) to the Territory in which USA **distributes** its service to a System.

See, Exhibit J, ¶ 1(a), p.1 (emphasis added). Paragraph 12 of the USA/Universal Agreement also discusses "films which are distributed" by the USA Network. (See, Exhibit J, ¶ 12, p.11 (first sentence of the second paragraph) The USA/Universal Agreement also describes NBC (the television network) as distributing the program: "Licensor and Licensee acknowledge that the Series is presently being **distributed** by NBC pursuant to a licensing agreement which grants to NBC the right to distribute each film . . . ." (See, Exhibit J, ¶ 24, p.18 (emphasis added)).

The USA Network is in the same position with regard to cable as NBC is with regard to over-the-air television. In

essence, the USA Network distributes programs by transmitting a signal to cable systems which then transmit the signal over cable so that the program can be received in the television household. The USA Network does not "exhibit" any programs - the "exhibitor" is the person who turns on his or her television. Similarly, television networks, like NBC, distribute programs as well. Television networks distribute a signal to their local affiliates.

The local affiliates then transmit this signal to the television household where it can be "exhibited" by the owner of the television set. (See, Abruscato Dec. ¶ 15; DeGuere Dec. ¶ 8; Yerkovich Dec. ¶ 16, submitted herewith as Exhibits K through M. See, also, Bradley Depo. 144:17 - 157:11; Larsen Depo. 29:11 - 75:10).

Further, when the word "distribute " is given its "ordinary meaning", it is obvious that the USA Network is a "distributor" and thus its "gross receipts" must be included within the calculation of "net profits". Webster's dictionary defines "distribute" as: "To divide and dispense in portions"; "To deliver or give out"; and "To diffuse or spread over an area" (See, Exhibit N). This is exactly what the USA Network does with the signal which it "distributes" to the local cable systems through satellite. (Bradley Depo. 144:17 - 157:11).

Additionally, lending further credence to the fact that the USA revenues should be included within the definition of "gross receipts" is the fact that, under Universal's current agreements, these monies are specifically excluded. (See, Bradley Depo. 41:22 - 44:22). Since Exhibit B contains no such specific exclusion, the inference must be drawn in Yerkovich's favor that these monies are **not** excluded in Exhibit B. Clearly, if the gross receipts of the USA Network were not to be included in Exhibit B, Universal would have had no reason to specifically amend its form agreement to exclude these monies.

Finally, even one of Universal's own expert witnesses,

Charles Larsen, testified that the USA Network is a distributor. (See, generally Larsen Depo. 29:11 - 75:10, and specifically, 67:11-14 and 70:20-25).

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY YERKOVICH ET. AL., PLAINTIFFS,	)
VS.	) CASE NO. CV 94-3927 ABC) LOS ANGELES, CALIFORNIA) MONDAY, SEPTEMBER 22, 1997
MCA, INC., ET AL., DEFENDANTS.	)

HEARING
BEFORE THE HONORABLE ANDREW J. WISTRICH
UNITED STATES MAGISTRATE JUDGE

* * *

MR. YANNY: NO, YOU – THEN I MISUNDERSTOOD WHAT YOUR HONOR SAID. BECAUSE YOUR HONOR SAID THAT HE WAS NOT GOING TO REQUIRE – THAT YOU WOULD REQUIRE THEM ONLY TO INDICATE MONIES RECEIVED BY UNIVERSAL FROM USA.

THE COURT: ALL RIGHT. AND YOU WANT THE –

MR. YANNY: I THINK I –

THE COURT: – MONEY RECEIVED BY USA?

MR. YANNY: BY USA.

THE COURT: OKAY.

MR. YANNY: BECAUSE –

THE COURT: AND YOUR THEORY IS THAT THEY ARE A PRODUCER COMPANY.

MR. YANNY: THEY ARE A PRODUCER COMPANY. THEY ARE JOINTLY OWNED.

THE COURT: DOES YOUR THEORY DEPEND ON THE FACT THAT THEY COULD BE CHARACTERIZED AS A PRODUCER COMPANY?

MR. YANNY: WELL, I THINK –

THE COURT: AND IF I WERE TO CONCLUDE THAT THEY WEREN'T A PRODUCER COMPANY, YOUR ARGUMENT WOULD FAIL.

* * *

THE COURT: I GUESS ONE THING THAT I'M STRUGGLING WITH ABOUT YOUR ARGUMENT –

MR. YANNY: WHAT IS IT, SIR?

THE COURT: – IS HOW SOMETHING QUALIFIES AS A PRODUCER COMPANY WITHOUT HAVING HAD ANYTHING TO DO WITH THE PRODUCTION.

NOW, YOU KNOW, I READ THIS DEPOSITION – – THIS PROVISION IN THE AGREEMENT DEFINING PRODUCER COMPANY. AND IT SEEMS – SEEMS QUITE BROAD.

ON THE OTHER HAND –

MR. YANNY: IT SEEMS QUITE WHAT, SIR?

THE COURT: SEEMS QUITE BROAD.

ON THE OTHER HAND, THE RESULT SEEMS COUNTERINTUITIVE TO ME.

* * *

MS. TITLE: I HAVE NO DOCUMENTS - IF WE ARE ASKING FOR DOCUMENTS THAT UNIVERSAL

WOULD HAVE THAT WOULD REFLECT THE MONIES RECEIVED BY USA NETWORK THAT ARE EARMARKED FOR MIAMI VICE, WE HAVE NO SUCH DOCUMENTS.